REGULATORY FLEXIBILITY ACT

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM

OF THE

COMMITTEE ON THE JUDICIARY

AND THE

SUBCOMMITTEE ON GOVERNMENT REGULATION AND PAPERWORK

OF THE

COMMITTEE ON SMALL BUSINESS

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

JOINT OVERSIGHT HEARING ON THE OPERATION OF THE REGULATORY FLEXIBILITY ACT

AND ON

S. 2170

A BILL TO AMEND CHAPTER 6 OF TITLE 5, UNITED STATES CODE, WITH RESPECT TO THE REQUIREMENTS FOR THE PREPARATION OF REGULATORY ANALYSES

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REGULATORY FLEXIBILITY ACT

THURSDAY, AUGUST 12, 1982

U.S. SENATE, SUBCOMMITTEE ON REGULATORY REFORM OF THE COMMITTEE ON THE JUDICIARY, AND THE SUBCOMMITTEE ON GOVERNMENT REGULATION AND PAPERWORK OF THE SMALL BUSINESS COMMITTEE,

Washington, D.C.

The joint subcommittees convened, pursuant to notice, at 9:38 a.m., in room 2228, Dirksen Senate Office Building, Hon. Paul Laxalt, presiding.

Present: Senators Hatch, Laxalt, Leahy, and Weicker.

Staff present (Subcommittee on Regulatory Reform): John F. Nash, Jr., chief counsel and staff director; Robert J. Cynkar, general counsel; and John Podesta, minority counsel; (Small Business Committee): Kimberly Elliot, professional staff member; Alan Chvotkin, minority chief counsel.

Also present: Sharon Matthews, legislative assistant to Senator Hatch (Small Business).

OPENING STATEMENT OF HON. PAUL LAXALT, A U.S. SENATOR FROM THE STATE OF NEVADA, CHAIRMAN, SUBCOMMITTEE ON REGULATORY REFORM

Senator LAXALT. The hearing will come to order.

Today the Subcommittee on Regulatory Reform of the Judiciary Committee and the Subcommittee on Government Regulation and Paperwork of the Committee on Small Business are holding a joint oversight hearing on the operation of the Regulatory Flexibility Act. In addition, we will consider an important amendment to the act proposed by our colleague, Senator Dodd.

The Regulatory Flexibility Act has been in effect for 1½ years now. This statute is a novel and promising first step to deal responsibly with the heavy burdens Federal regulation puts on small business and small governmental entities. It incorporates into the regulatory process a requirement that Federal agencies assess the potential impact of their regulations on small businesses and tailor their requirements to respond to the unique situation of those businesses.

Making the small business perspective a basic element in our regulatory policies in this way can only contribute to effective regulation by creating regulatory requirements with which small business can reasonably comply.

The operation of the act, however, suggests that the act might not be producing the benefits for small business that it promised. Obvious questions have arisen concerning the ability of the Small

Business Administration's Chief Counsel for Advocacy and of the Federal courts to perform effective and well-integrated oversight of agency compliance with the act. In addition, there is some doubt as to whether the specific language of the statute gives Federal agencies specific enough guidance to thoroughly consider the small business impact of proposed Federal regulations.

These matters are certainly of important concern to Frank Swain, the SBA Chief Counsel for Advocacy and to others in Government and the small business community who deal regularly with the act.

But this hearing today also represents the commitment of the members of the Subcommittee on Government Regulation and Paperwork and of the Subcommittee on Regulatory Reform to the principles of the Regulatory Flexibility Act. Oversight of laws we have already enacted is one of the less glamorous tasks in the Senate. I would like to compliment all my colleagues who have been involved in the planning of this hearing, particularly my cochairman, Senator Hatch, for their continuing contribution to the long-term success of the Regulatory Flexibility Act and, as a result, to the improved productivity of small business.

Senator Hatch?

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON GOVERNMENT REGULATION AND PAPERWORK

Senator HATCH. Thank you, Senator Laxalt.

I am pleased to be participating in this oversight hearing, along with my distinguished colleague, Senator Paul Laxalt of Nevada.

Enacted in 1980 and implemented in January 1981, the Regulatory Flexibility Act, commonly known as Reg-Flex, requires Federal agencies to consider the impact any Federal regulation would have on small businesses and governmental units before such regulations can take effect.

The purpose of this hearing is twofold. First, I believe this hearing will provide Congress with an important and timely opportunity to examine what effect the Regulatory Flexibility Act has had in reducing regulatory burdens for the 14 million small businesses in the United States. Second, it will allow us to examine what changes, if any, should be made in the law.

One such change pending before Congress is a proposal by Senator Dodd of Connecticut to include the Department of Defense and Internal Revenue Service under the provisions of the Regulatory Flexibility Act. I am very pleased that Senator Dodd has taken time to be with us today and has agreed to present testimony regarding his legislation.

Another issue which appropriately will be discussed today is the issue of judicial review. Although this legislation was heralded as a major victory for small businesses, the law, as enacted, left the questions of judicial review and consequently, enforceability of the act, unanswered.

During consideration of the Regulatory Flexibility Act, some Members of Congress expressed their concerns that if strong authority were given to enforce the act, the entire regulatory process

might be stymied. On the other hand many argued that the statute required some sort of enforceability provisions, or the law would have been rendered meaningless. Consequently, the SBA's Office of Advocacy was given the responsibility to see that the act would be enforced. However, the result of congressional compromises left the issue of judicial review of the law somewhat ambiguous. Reg-Flex does not provide for review of agency certifications, or procedural decisions, nor any intermediate review of any regulatory flexibility action. Yet, judicial review may be permissible when the regulatory flexibility analysis is considered as part of the whole report.

Currently, this issue is tied up in the courts for further clarification. Therefore, I believe it is particularly appropriate for these subcommittees to gather testimony on this issue.

In addition to Senator Dodd, today's witnesses include the Honorable Frank Swain, Chief Counsel of the SBA's Office of Advocacy, which has the responsibility of enforcing this statute. I look forward to Mr. Swain's report as to how well Federal agencies have complied with the provisions of Reg-Flex.

In addition, we are pleased to have a panel representing the small business community's response to Senator Dodd's proposal and the impact Reg-Flex has had in small business circles. We also will be pleased to hear the Department of Defense response to Senator Dodd's bill which would unequivocally include the agency under this existing law. Finally, we will look forward to a discussion of the judicial review issue from a panel representing views from both the academic and legal community.

As I am sure all of you are aware, one of the primary goals of this administration is that of removing regulatory redtape. In my opinion, this is one area where regulators may provide important and somewhat immediate relief to small business owners, many of whom are struggling for survival under the pressure of persistently high interest rates. As one who has consistently argued for measures which would allow the free market to work to its full capacity, I am particularly pleased to participate in today's discussion, and I want to personally thank Senator Laxalt for the opportunity to cochair this hearing. I would like to commend him, Senator Leahy, and others for the great job they have done in trying to bring about less regulatory control and more regulatory flexibility.

I think Senator Laxalt and certainly, Senator Leahy as well, have been great leaders in this effort, and I feel honored to be with him here today.

Senator LAXALT. Thank you, Senator Hatch.

Senator Leahy?

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman, and thank you, Senator Hatch, for those kind words.

I am pleased that our Subcommittee on Regulatory Reform and the Subcommittee on Government Regulation and Paperwork of the Small Business Committee have come together to begin the critical process of congressional oversight of the Regulatory Flexibility Act.

Three years ago, while we were writing the Regulatory Flexibility Act, I chaired some field hearings in Vermont. During those hearings, small business people and State officials shared their often bitter experiences with Federal regulatory requirements. I say "bitter," because regulations applied across the board to big and small businesses and organizations, or to large urban centers and small rural communities, put a disproportionate burden on the smaller, regulated entities. As we learned from the Vermonters who testified and from conversations with people all over the country, this disproportionate impact is particularly evident with Federal paperwork and recordkeeping requirement.

The paperwork burden, I do not need to tell you, is just the tip of the iceberg. We could not begin to assess the interference with production, the billions of dollars in investments to comply with regulatory standards, and the frustration and anxiety and anger generated by many Federal regulations. The Regulatory Flexibility Act was enacted to even up this score. It directs Federal regulators to examine the disproportionate regulatory impact on small entities and to correct it wherever possible. Unfortunately, we have received complaints that Federal regulators are not fulfilling their responsibility to tailor regulations and paperwork requirements to the size and resources of the businesses, the organizations and units of government they regulate.

So we are holding these hearings to learn about the experiences these witnesses have had with regulatory flexibility. We want to learn early on whether regulatory flexibility analysis is a useful management tool; has it helped Federal agencies cut the burdens experienced by small, regulated entities; can the agencies' implementation of regulatory flexibility be improved, and if so, how. We are also here to explore the extent of the Regulatory Flexibility Act's coverage.

Our first witness, Senator Dodd, of Connecticut, deserves a great deal of credit not only for his overall contribution to our regulatory reform effort, but for raising very important questions about the applicability of the Regulatory Flexibility Act to Department of Defense and Internal Revenue Service regulations. Be sure the Department of Defense and the Internal Revenue Service have substantial effects on our economy through their procurement and their tax policy activities.

During the floor debate on S. 1080, the Regulatory Reform Act, Senator Laxalt and I agreed with Senator Dodd to hold this hearing to explore these questions and take a careful look at his bill, S. 2170, not only whether case law and regulatory flexibility will certainly need more time to develop, but the early cases have raised important policy questions about oversight mechanisms for regulatory flexibility.

We will be asking our witnesses what we in Congress can do to assure that Federal regulators have been following the requirements.

I do compliment both the chairmen here today for having these hearings. This is an area that has united a number of people, Republicans and Democrats, across a certain ideological span, some of which is hinted at, at least, by the panel here today, and one that cuts across geographical and other boundaries.

We are all concerned, whether from a little State like Vermont or from a large urban center, whatever, about the effect of these regulations. I think we are committed in a bipartisan effort to get them under control.

Thank you, Mr. Chairman.

[Prepared statement of Senator Weicker follows:]

SENATOR LOWELL WEICKER, JR.

CHAIRMAN

COMMITTEE ON SMALL BUSINESS

HEARING TO OVERSEE THE REGULATORY FLEXIBILITY ACT

AUGUST 12, 1982

MR. CHAIRMEN, I WISH TO COMMEND BOTH OF YOU FOR SCHEDULING THIS JOINT HEARING TO OVERSEE THE REGULATORY FLEXIBILITY ACT AND TO CONSIDER AN AMENDMENT TO THE PRESENT LAW. SINCE ITS ENACTMENT IN 1980, IMPLEMENTATION OF THE REGULATORY FLEXIBILITY ACT HAS BEEN A MAJOR CONCERN OF THE SMALL BUSINESS COMMUNITY AND THE OTHER ENTITIES WHICH COME UNDER ITS PROVISIONS. SMALL BUSINESS OWNERS BELIEVE, AND I CONCUR WITH THEM IN THIS BELIEF, THAT IF THIS ACT IS TO PROVIDE MEANINGFUL REGULATORY RELIEF, FEDERAL AGENCIES MUST COMPLY NOT ONLY WITH THE LETTER OF THE LAW, BUT WITH ITS SPIRIT AS WELL. THIS HEARING AFFORDS BOTH SUBCOMMITTEES AN EXCELLENT OPPORTUNITY TO REVIEW AGENCY COMPLIANCE WITH THE ACT TO DETERMINE WHETHER OR NOT THERE IS A NEED FOR CHANGES IN THE LAW AND TO ANALYZE HOW THE ACT WILL BE MEETING ITS OBJECTIVES IN THE FUTURE.

DURING THIS HEARING, WITNESSES ALSO WILL PRESENT TESTIMONY ON S. 2170, A BILL THAT WOULD EXTEND THE REGULATORY FLEXIBILITY ACT TO THE DEPARTMENT OF DEFENSE AND TO THE INTERNAL REVENUE SERVICE. BOTH AGENCIES CONSIDER THEMSELVES TO BE EXEMPT FROM COMPLIANCE WITH P.L. 96-354 BECAUSE THEY DO NOT PROMULGATE RULES PURSUANT TO SECTION 553(B) OF THE ADMINISTRATIVE PROCEDURES ACT. HOWEVER, SINCE BOTH PROMULATE RULES THAT AFFECT SMALL BUSINESSES, THERE IS CONSIDERABLE FEELING THAT THESE AGENCIES SHOULD BE SUBJECT TO THE LAW. I ANTICIPATE A THOROUGH AND LIVELY DISCUSSION OF BOTH SIDES OF THIS ISSUE THIS MORNING.

PASSAGE OF THE REGULATORY FLEXIBILITY ACT REPRESENTED A MAJOR VICTORY FOR THE SMALL BUSINESS COMMUNITY. UNDER THE ACT, FOR THE FIRST TIME, GOVERNMENT POLICY-MAKING AGENCIES ARE REQUIRED TO TAKE INTO CONSIDERATION THE NEEDS AND LIMITATIONS OF SMALL BUSINESSES WHEN THEY ARE PROMULGATING RULES THAT AFFECT THEM. THE ACT EMERGED FROM A

BROAD-BASED CONCERN OVER REGULATORY REFORM AND IN PARTICULAR, OVER SPECIFIC FINDINGS OF THE CONGRESS THAT SMALL ENTITIES OFTEN BEAR A DISPROPORTIONATE SHARE OF THE BURDEN POSED BY FEDERAL REGULATIONS. THE LAW SPECIFICALLY STATES THAT THE "FAILURE TO RECOGNIZE DIFFERENCES IN THE SCALE AND RESOURCES OF REGULATED ENTITIES HAS IN NUMEROUS INSTANCES ADVERSELY AFFECTED COMPETITION, DISCOURAGED COMPETITION AND RESTRICTED IMPROVEMENTS IN PRODUCTIVITY."

MR. CHAIRMAN, OUR SMALL BUSINESSES HAVE THE POWER AND THE POTENTIAL TO BEGIN TO TURN OUR NATIONAL ECONOMY AROUND, BY BOOSTING PRODUCTIVITY, PROVIDING JOBS AND INCREASING COMPETITION. BUT THEY CAN NEVER REALIZE THAT POTENTIAL IF THEY ARE HELD DOWN BY RESTRICTIVE REGULATIONS THAT SAP THEM OF THEIR TIME, THEIR ENERGY AND THEIR INITIATIVE.

THE REGULATORY FLEXIBILITY ACT DOES NOT ARGUE THAT SMALL BUSINESSES SHOULD BE FREE FROM REGULATIONS: WE ALL KNOW THAT REGULATIONS ARE NECESSARY IN ORDER TO MAINTAIN STANDARDS OF QUALITY, FAIRNESS AND RESPONSIBILITY. NO, THE ACT SIMPLY SAYS THAT FROM NOW ON, AGENCIES MUST CONTINUALLY RECOGNIZE AND KEEP IN MIND THE UNIQUE NEEDS AND CAPABILITIES OF THE SMALL FIRMS THEY ARE REGULATING.

UNFORTUNATELY, WHILE MANY FEDERAL AGENCIES HAVE BEEN FAITHFULLY COMPLYING WITH THE REGULATORY FLEXIBILITY ACT, MANY HAVE PROCEEDED TO REGULATE AS IF THE LAW DID NOT EXIST. A ROUTINE CERTIFICATION STATING THAT A PROPOSED REGULATION "DOES NOT HAVE A SIGNIFICANT ECONOMIC IMPACT ON A SUBSTANTIAL NUMBER OF SMALL ENTITIES" IS NOT WHAT I CONSIDER ADEQUATE COMPLIANCE WITH THE ACT IN MOST CASES. REMEMBER, IN PASSING THE REGULATORY FLEXIBILITY ACT, WE IN CONGRESS DELIBERATELY IMPOSED AN ADDITIONAL STEP ON FEDERAL RULEMAKERS: CONSIDERATION OF <u>REGULATORY ALTERNATIVES</u> IS NOW THE EXPRESS DUTY OF ALL REGULATORS. AND I BELIEVE THAT TO IGNORE THIS DUTY IS TO VIOLATE THE LAW.

I HOPE THAT THIS HEARING WILL TAKE A HARD LOOK AT WHAT NEEDS TO BE

DONE TO ENSURE THAT THIS PRACTICE DOES NOT CONTINUE. AS PART OF THIS PUSH FOR INCREASED COMPLIANCE, I AM HOPEFUL THE SBA OFFICE OF ADVOCACY WILL INCREASE ITS EFFORTS TO MONITOR THOSE AGENCIES WHICH ARE NOT COMPLYING FULLY WITH THE ACT, AND WILL TAKE WHATEVER STEPS IT CAN TO BRING ABOUT IMPROVED COMPLIANCE. FINALLY, BECAUSE NO PRODUCT OF A LEGISLATIVE PROCESS IS COMPLETELY PERFECT, I HOPE THAT CONGRESS AND THE COURTS WILL CLARIFY AREAS OF AMBIGUITY IN THE LAW, SO THAT ALL AGENCIES ARE EQUALLY AWARE OF WHAT WE MEAN BY FULL COMPLIANCE WITH THE ACT.

I BELIEVE THAT IF ALL CONCERNED PARTIES -- THE CONGRESS, THE AGENCIES, THE SBA OFFICE OF ADVOCACY AND ULTIMATELY, THE COURTS -- LIVE UP TO THEIR FULL OBLIGATIONS UNDER THE REGULATORY FLEXIBILITY ACT, THE SMALL BUSINESS COMMUNITY IN PARTICULAR, AND THE U. S. ECONOMY IN GENERAL, WILL BENEFIT GREATLY.

Senator LAXALT. As Senator Leahy indicated, during the time we were processing Senate bill 1080, which is the major Regulatory Reform Act, adopted awhile ago in the Senate, we were asked to consider processing an amendment to be submitted by Senator Dodd. At that time, we requested that he appear at this particular hearing and delay offering his amendment, which we greatly appreciated. And this is, at least, a partial fulfillment of the commitment that both Senator Leahy and I made to Senator Dodd.

So, Senator Dodd, we welcome you, and we look forward to your testimony.

STATEMENT OF HON. CHRISTOPHER J. DODD, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator DODD. Thank you very much, Mr. Chairman.

I am very grateful to you, Senator Hatch, Senator Leahy, and other members of the committee for holding the hearing and considering the proposal. I appreciated at the time that I was considering offering the amendment that it was one that deserves attention, but needeeds to be examined thoroughly. The implications of including DOD and the IRS under "Reg-Flex" require study, so I am truly grateful to both of you and members of the committee for giving me a chance to appear before you.

I would like to commend both the Judiciary Regulatory Reform Subcommittee and the Small Business Government Regulation Subcommittees for convening this hearing on the experience of the Regulatory Flexibility Act. One of Congress most important responsibilities and in my judgment, one of its most neglected ones, is its oversight function. Too often, the last time we undertake a serious detailed scrutiny of legislation is when we send it to the White House for the President's signature. How the agencies and courts implement or interpret the intent of Congress and how the legislation actually affects individuals and organizations in the real world are issues we are more prone to overlook than to oversee.

In general, therefore, I welcome the opportunity to participate in an oversight hearing of this nature, and I see it as a useful antidote to that problem. But on this particular legislation, it seems to me that Congress has special oversight obligations.

It is important to remember, Mr. Chairman, that one of the premises underlying congressional approval of regulatory flexibility was our recognition that small businesses often lack the financial resources and sophisticated legal expertise to hold their own in the regulatory wars. If a proposed regulation was expected to have an unfavorable impact on Exxon, for example, you could be assured that a legion of company lawyers, lobbyists, and consultants would be in the field overnight to undo it. If a court ruling adversely affected General Electric, which has its corporate headquarters in Connecticut, a legal appeal, I can guarantee you, would be filed, supported by enough documentation to fill a warehouse. Even the best-managed of small businesses, however, may not be able to assign someone to read the Federal Register itself, let alone respond to every proposal or interpretation which poses a threat to its well-being. That is why we passed the Regulatory Flexibility Act in the first place: To build into the structure of the Federal rule-

making process a protection of the vital role which small businesses play in our national economy.

If we are serious about the purposes of the legislation—I believe we are—it makes sense for us to insure that the same bureaucratic evasions and negative court decisions do not subvert our intent with regard to regulatory flexibility. This is not to disparage the excellent work, I might add, done by the small business representatives who are here today. And I note with particular pleasure, Mr. Chairman, that Mr. Shaw Mudge from Connecticut is here, so you are going to hear very vibrant testimony from Connecticut. You can count on good, aggressive testimony from Shaw. He has been one of Connecticut's most active people and has energized every congressional district and both members of the Senate. Committees formed all over the State at his initiative meet with us periodically, to outline the specific problems the people in our own State face. This has all been the work of Shaw, who has done a tremendous job in this area, and I am delighted he is going to be appearing before you as well. I do not know what he is going to say about my bill yet. Maybe I should be careful about praising him too highly. But at any rate, you are going to hear from him.

Senator LEAHY. Senator Dodd, the panel notes the amazing coincidence of having somebody from Connecticut testify. Both you and Senator Weicker are here, and it certainly is a happy chance.

Senator DODD. Well, instead of Senator Weicker coming, he sent Shaw Mudge. [Laughter.]

Senator HATCH. I am sure the comments will be very appropriate about your bill, also. [Laughter.]

Senator DODD. At any rate, I do think there is a responsibility to overlook and see what we are doing here. With that in mind, let me mention a few areas very briefly that I believe deserve special attention of the Small Business and Judiciary Committees. Two of these are reasonably well known, and I will merely highlight them. The committee has already, obviously, spent some time considering them.

A third has been mentioned very kindly by all three of you, and is a proposal that I have offered, S. 2170, to correct what is in my judgment a fundamental misinterpretation of the purposes of the original act. The two issues that I want to cite briefly are those of judicial review, and the affirmative action or outreach segment of the legislation.

With regard to judicial review, the controversy surrounding the Thompson V. Watt decision is well known to the members of this panel and, I am sure, the staff. Senator Weicker and other members of the panel will recall that I wrote the committee in March of this year to request the Small Business Committee's assistance in obtaining an explanation of the failure of the SBA's Office of Advocacy to support the principles of regulatory flexibility in this, the first test case, really, brought under the act. I might note that both my colleague from Connecticut and the ranking member, Senator Nunn, promptly acted to obtain that information. I am particularly grateful to the committee for their expeditious handling of that request.

Closely related to the reluctance of the Office of Advocacy to play its assigned statutory role was the decision of Judge Green

that the Federal courts simply had no jurisdiction to determine whether an agency had violated the provisions of the Regulatory Flexibility Act.

I would grant that the provisions of the act and their legislative history are less than models of clarity, for the obvious reasons that have been identified by the members of the committee this morning. I believe firmly, however, that the conflicting signals which the provisions emit were not intended to be carte blanche for agencies to ignore the requirements of the bill, but rather, a very aggressive and honest attempt to balance the need to compel a good faith compliance by Federal agencies with an avoidance of an infinite regress of court challenges of every determination made under the legislation.

At any rate, the evidence that many agencies are disregarding regulatory flexibility and Judge Green's unfortunate ruling that the judicial branch will look the other way say to me that we need to reexamine clearly the enforcement mechanisms within the legislation. On this issue, I am confident of the diagnosis, but make no claims to have discovered a cure. I simply want to urge the two committees to seek the views of interested parties on the matter.

A second area that will bear some attention includes the outreach provisions of the legislation. That provision, as you will recall, was intended to achieve a broader application of the principles of regulatory flexibility in the real work of small business. The "outreach" section of the act, section 609, for example, was based on the assumption that a leisurely perusal of the Federal Register may not be a component of every small business owner's daily regimen. Unless you are being paid a K Street corridor attorney's hourly rates, requiring that duty might be unconstitutional, I would add, under the "cruel and unusual" clause of the Constitution. So Congress envisioned, just to cite one alternative, that agencies should advertise the existence of proposed rules in the specific trade journals and other publications which small business operators were likely to read. My impression is that this exercise in commonsense has had a good-faith cooperative reception in many agencies. The ICC is notably praiseworthy in this respect, but other agencies have acted as if it scarcely existed at all. A genuinely useful contribution could be made by the congressional oversight committees by requiring an agency-by-agency report of their efforts to comply with section 609 and administering some pointed advice to those whose record is less than laudable in this area. Rather than adding new amendments, I think a little encouragement is perhaps all that is necessary.

Finally, Mr. Chairman, I wish to urge the consideration, as I mentioned at the outset, of an explicit extension of the provisions of regulatory flexibility to agencies that claim that they are exempt under the provisions of this act.

I introduced S. 2170 for the purpose of closing a loophole in the Regulatory Flexibility Act, which I do not believe Congress ever intended to leave open. The act requires a regulatory flexibility analysis to determine what the impact might be under alternative ways of implementing the rules. That was the very simple explanation of the legislation. Federal agencies are encouraged to adopt the least onerous approach. The act requires that when the rulemaking

process is opened up to the public, its impact on the so-called little guys as well as the big ones be assessed and that rule writers be sensitive to the needs and problems of small entities.

I do not think that is too much to ask, quite frankly, nor does it appear that, in many cases, Federal agencies have found this procedure impossible to live with, notwithstanding the claims of some when the legislation was being considered in the first place.

For example, the Interstate Commerce Commission has eliminated the requirement that small motor carriers file annual reports with the Commission. The Labor Department has eliminated one of the onerous pieces of paperwork associated with the Davis-Bacon Act—a weekly report on each worker. The Department of Transportation is holding public hearings in the evenings to enable small businesspeople to attend. However, officials at some agencies have taken a different view, unfortunately. The most notable examples that come to my attention are the Department of Defense and the Internal Revenue Service. Both of these Agencies have claimed a virtual blanket exemption from the requirements of the Regulatory Flexibility Act on the grounds that they are not required by section 553(B) of the Administrative Procedures Act, which Reg-Flex amends, or any other law to publish notice of proposed rulemaking for public comment. Now, I quickly would add here that both of these agencies have of their own volution agreed to make public notice and ask for public comment, but they are doing that voluntarily. They are not required to do so under law. And I am glad they do it, I think it makes sense, and I hope they continue the practice. It does not make sense to have a different set of rules, however, for how those two departments deal with small businesses who are affected by their rules and regulations so significantly. Clearly, the impact of the IRS is pervasive; the Department of Defense, you could make a case, is less so—but even there, I would argue that because of small contractors, there clearly are an awful lot of people impacted by their rulemaking procedures, as well.

It would be difficult to imagine, therefore two Federal agencies whose actions are of greater consequence to small businesses and small entities generally, than the Internal Revenue Service and the Department of Defense.

The IRS regularly writes rules which have profound consequences for the financial health of small business. Just last October, for example, the IRS published an extremely controversial notice of proposed rulemaking, which expressed an intention to sharply restrict the "pooling" of tax-exempt industrial development bonds. Congress was rapidly apprised of the very negative consequences of such a rule on the ability of small businesses to secure financing. Nonetheless, the IRS claimed, because it is not covered by section 553(B), that it was not required to perform a regulatory flexibility analysis.

Likewise, the importance to small business of Defense Department rulemaking, particularly in the area of contracting, is difficult to exaggerate. In my home State of Connecticut—which, I might add, is the most dependent State in the Nation on a per capita basis on defense contract work—the landscape is dotted with virtually hundreds of small contractors for whom Department of Defense contracts constitute a vital amount of business. They are a

major part of the nearly 30 percent of the work force in my State who depend on Defense Department contracts for their livelihood. Its discretionary budget is the largest and the fastest growing of any Federal agency, and it would simply be a mistake to grant the Defense Department's claim that it is exempt from the requirements of the act.

Clearly, if this act is to be meaningful to small business, as many departments and agencies as have real impact on small business must comply with its provisions. The intentions of regulatory flexibility are clearly spelled out. Rule writers should take the concerns of smaller entities into account whenever considering new rules, and specifically determine the consequences of those rules for small entities. That principle is worth defending and, I believe, extending. That act may not be perfect, and the fact that the Internal Revenue Service and Department of Defense have found technical arguments in support of their noncompliance ought to serve to highlight the need for further refinement of the act as we go along.

I hope that the committee will consider my proposal with these observations in mind. Small businesses have enough problems in the present economic climate without having to needlessly suffer under the burden of excessive or unnecessary unduly costly regulations.

As Senator Leahy pointed out, I would add that this is a critical issue because we all feel so strongly about the role of small business in our economy. The statistics are so often cited that they are threadbare about where innovation comes from in this country, where employment comes from in this country. Small business plays the lion's share role in both of those areas, and we clearly want to do what we can to make it easier for small firms to succeed. And obviously, I think, having the IRS and the Department of Defense be sensitive to that goal is something that we ought to pursue. I appreciate the opportunity to give you a pitch on it and hope you will consider it and support it.

Thank you.

Senator LAXALT. Thank you, Senator, for an excellent presentation. Tell me this. You have lived with this problem a long while, Senator Dodd. Do you think the reluctance, if not the outright opposition, of both IRS and Defense, is attributable to deficiencies in the act itself, or are they stonewalling this? What do you think essentially is the problem?

Senator DODD. Well, their objection as I understand it—and they certainly will testify to their own concerns on this better than I can—is the APA does not cover them. If it did their fear is that they would be covered under every imaginable regulation that came along. I do not know what the legislative history is. I have not been able to go back and discern why it was initially, that they were not covered under APA.

So I think they are probably just taking advantage of the fact that when we amended the APA with Reg-Flex they were still left out of it, in effect. So they are just trying to do, I suppose, what others would do. If they are not being covered, technically, they have got a door to slip through. I think their assumption must be what other agencies' assumption was when we considered the bill in the first place. We cannot possibly do this. It is a nice idea. It

makes for a great speech. But it is going to cost us more time and money, it is going to require more paperwork, in effect, for us to distinguish between small businesses and larger enterprises. I would gather those same arguments are being made today in the halls of the Pentagon or the IRS. I think as we have discovered, the agencies have found it is not difficult to live with it at all; it was rather easy to do. In fact, as I have cited in here, a number of agencies have done very significant and worthwhile things in the area of Reg-Flex.

That is why, by the way, my amendment or my bill amends Reg-Flex by saying that those agencies that publish their regs and ask for public comment would be covered under Reg-Flex. As I cited in my testimony, the Department of Defense and IRS voluntarily do that.

Senator LAXALT. And you are satisfied with that?

Senator DODD. Well, I would be. My concern is, quite frankly, that they will say, "Well, we will get out of doing this; we will just stop publishing our regs and asking for public comment." Now, I think that would be a mistake because, frankly, if they do that, then I can see some member of this body, or some member of the House, coming forth and saying, "Fine, let us put you under APA. We will just throw you under that Law with everybody else." And I would hope that the Department of Defense and IRS, if their arguments were legitimate in the first place for not being included under that act, would not provoke that kind of a legislative response as a result of their failure to try to be more creative and sensitive to small businesses under Reg-Flex.

Senator LAXALT. Well, if it is a matter of policy, as you have indicated in your testimony, they should be included. So why not compel them to do so under the legislation?

Senator DODD. Under APA or under Reg-Flex? My bill suggests at least the latter.

Senator LAXALT. You would far prefer, I gather, from the thrust of your testimony that they voluntarily comply.

Senator DODD. Well, I suppose that is the immediate thing they could do. But each administration changes, and people change, and people become protective. And as I cited, I think you are going to get the argument—I am sure all of you heard this when the original legislation was proposed. "We cannot possibly do it. It is too onerous to do." It is possible that there are those right now who would comply voluntarily. What happens 5 years from now, when someone comes in and says, "Well, let's not bother with that. It is too much of a problem." I really think we are going to have to try to cover it here by legislation. It can be done quite simply.

Senator LAXALT. Much of the responsibility, as you have properly indicated, rests right here, and we have not been all that great in our oversight responsibilities ourselves.

Senator DODD. Well, I am a bugaboo on that. I would like to see a moratorium for one Congress on new laws, and that we just do oversight. It used to be, I guess, the old idea was that if you ran for office and did not have a list of legislation introduced and passed as long as your arm, you could not get re-elected. I think just the opposite is the case today. I have seen people go back and say, "If elected, I promise not to introduce one bill, but to make the present

ones work." And I think you get a much more responsive reaction from your constituency with that.

We tried all sorts of creative ideas in the House to pursue oversight—things like biannual authorizations rather than annual authorizations, to give committees more time. The problem is the time. We do not have the time to do it. That is the problem.

Senator LAXALT. Senator Hatch?

Senator HATCH. Thank you for coming, Senator Dodd. I have no questions, and I appreciate your testimony very much.

Senator DODD. Thank you, Senator.

Senator LAXALT. Senator Leahy?

Senator LEAHY. I have no questions either, Mr. Chairman. In fact, I am going to have to leave in a few minutes to go to the Intelligence Committee on a matter that has come up of some urgency, so I will have to leave, but I would——

Senator DODD. I am not sure they are covered under Reg-Flex. [Laughter.]

Senator LEAHY. I wonder if I could leave some questions with the staff for some of the witnesses coming up, because I have gone through some of the matters that will be covered by following witnesses, and I think we have some extremely interesting things coming up here, and I would like to leave some questions.

Senator HATCH. Why don't we leave the record open for the rest of the day for questions from anybody on either committee.

Senator LEAHY. Thank you.

Senator DODD. I thank you very much, and I appreciate the concern.

Senator LEAHY. Thank you—and I thank you again for your cooperation during the time when we had S. 1080 on the floor. I am glad it has worked out well.

Senator DODD. Not at all. I think generally, it is a far better way to proceed.

Thank you.

[The text of S. 2170 follows:]

II

97TH CONGRESS
2D SESSION

S. 2170

To amend chapter 6 of title 5, United States Code, with respect to the requirements for the preparation of regulatory analyses.

IN THE SENATE OF THE UNITED STATES

MARCH 4 (legislative day, FEBRUARY 22), 1982

Mr. DODD introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend chapter 6 of title 5, United States Code, with respect to the requirements for the preparation of regulatory analyses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 601(2) of title 5, United States Code, is amended by striking out "pursuant to section 553(b) of this title, or any other law".

(b) Section 603(a) of such title is amended by striking out "is required by section 553 of this title, or any other law, to publish" and inserting in lieu thereof "publishes".

(c) Section 604(a) of such title is amended by striking out "under section 553 of this title, after being required by

that section or any other law to publish" and inserting in lieu thereof a comma and "after publishing".

Senator HATCH. Our next witness will be Hon. Frank Swain, who is the Chief Counsel for Advocacy of the Small Business Administration.

Mr. Swain, we are delighted to have you here, and we will look forward to taking your testimony at this time.

STATEMENT OF HON. FRANK SWAIN, CHIEF COUNSEL FOR ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION

Mr. SWAIN. Thank you very much, Senator Hatch, and Senator Laxalt and Senator Leahy. It is a genuine privilege to appear in front of this joint meeting of your subcommittees. As you know, the Committee on Small Business is my general oversight committee, and I have had the opportunity to appear in front of them on several occasions. All of you here today were prime movers in the Regulatory Flexibility Act [RFA] when it was considered by the Congress in 1979 and 1980, and I am greatly encouraged by your continued interest in it.

As head of the office charged with monitoring the Government-wide compliance with RFA, I especially appreciate this opportunity. I would like to say that the RFA sets up the Office of Advocacy to perform a particular role, and as the compliance monitor, we sometimes have a particular viewpoint with which the Administrator may or may not agree. Therefore I would like to emphasize that my remarks this morning are my own opinions and do not represent the official position of the administration.

The Regulatory Flexibility Act has been in effect for about a year, and I think its underlying principles have begun to take hold in the agencies. Much has been accomplished, but as always, much more needs to be done. I think agencies are recognizing the need for regulatory analyses geared toward more precise rulemaking. The attractiveness and the effectiveness of the regulatory flexibility concept is reflected by the fact that at least 10 States have already adopted regulatory flexibility legislation and at least as many others are now considering it.

By the way, Senator, I have a lengthy statement, and you have a busy schedule this morning, therefore I wonder if I might just summarize the statement and have it admitted into the record.

Senator HATCH. We would appreciate that.

Mr. SWAIN. Thank you.

The fundamental goal of the Regulatory Flexibility Act is to insure that Federal regulation is imposed on small entities only to the degree necessary to meet the statutory requirements of substantive legislation. This emphasizes the importance of agency awareness and understanding of the impact of regulations on small business—the idea being that when an agency looks at a regulatory issue through a small business lens, they will be able to provide not only regulatory relief, but at the same time, place the regulatory scheme on a more sound footing.

The Regulatory Flexibility Act calls on agencies to integrate small business thinking into all of their regulatory planning. They must actively seek out data and opinions to understand small business impact and incorporate their findings into their rulemaking activities.

The first regulatory flexibility issue that we are looking at is that agencies are required to develop semiannual agendas and periodic review plans. Under these provisions the agencies are required to set forth their calendar for the public, for the Congress, for the small business community, and of course, for our office to examine the potential impact of their regulatory decisions.

The periodic review plan provision requires agencies to publish a plan under which they will review all existing regulations to assess their impacts on small entities. The administration feels so strongly about this concept that President Reagan, in his March 1982 report on "The State of Small Business," specifically called for all the agencies to accomplish those review plans over a 5-year timeframe instead of over 10 years. In other words, the agencies are within the next 5 years to have reviewed all the major regulations that are on the books that have an impact on small business, with an eye toward assessing that impact and lightening the bureaus, if at all possible.

Senator LAXALT. How is that moving?

Mr. SWAIN. Most of the agencies have published their review agendas. We are just now seeing some agencies starting to take a look at regulations that are already on the books. I think that the Labor Department probably is the most exemplary agency in this category. They are reviewing the Davis-Bacon Act regulations, Service Contract Act regulations, and regulations issued under the OFCCP Executive orders. As I will discuss later on in my testimony, the Department of Labor is not only one of the best, in terms of looking at what is already on the books, but also one of the best agencies for compliance in general with the Regulatory Flexibility Act. They have done some excellent small business analyses. They are very open, it seems to me, to small business outreach.

Senator LAXALT. Why would they be doing so well and others not?

Mr. SWAIN. I think that, obviously, this administration is committed to seeking changes in some Labor Department regulations which they feel have not been examined for some time. Not only the requirements of the Regulatory Flexibility Act but also the interest of the people involved at the Department of Labor and the President are responsible for the good record of the agency.

Unfortunately, the Regulatory Flexibility Act and the other laws, as good as they are, still do not solve all of our problems. In my opinion, one of the Department of Labor's major reforms is the proposed changes in the Davis-Bacon Act regulations. However, the proposed regulations are currently being challenged in court where they have been at least temporarily set aside. This demonstrates that although Reg Flex is one way to look at the regulatory process and to make some progress in some categories, but the new law does not change the underlying law. In this case, it is the Davis-Bacon Act itself that is in dispute.

Senator HATCH. I would like to interrupt you on that point. In addition to the Secretary of Labor, who has worked long and hard to try and apply these principles—and I want to personally compliment him—who else at the Department of Labor has been especially helpful in accomplishing these goals?

Mr. SWAIN. Well, our office has, of course, been consistently dealing with the Solicitor's Office, and we have found Mr. Ryan and his staff to be very open, not only to suggestion, but also to reaching out for more information. We think that they really have an exemplary record.

Senator HATCH. Well, we have found that, too, and I just want to personally thank you for bringing it up, because I think the Department of Labor has received a lot of kicks and knocks over the last year and a half, but they have not received much credit for a lot of the very, very important things they have done, and this is one of them.

Mr. SWAIN. The Department of Labor has always had a very heavy influence on small business, because, regardless of the type of business, minimum wage or some other labor regulation applies. In our opinion, the Department of Labor has one of the best records for trying to do better with the laws and the regulations that are on the books.

Senator HATCH. Do you feel that the changes they are making are really substantive and not just procedural changes?

Mr. SWAIN. The changes they are attempting to make, I think, are substantive changes. Whether they are being made in individual cases relies on a number of other factors.

Senator HATCH. Thank you. Go ahead. I did not mean to interrupt you.

Mr. SWAIN. Thank you, Senator.

I would like to mention that, as part of our outreach effort, the Office of Advocacy has distributed to every Federal agency a compendium of small business associations and contacts. In addition we are also preparing and expect to have distributed to all major Federal agencies a compendium of our small business data base, which should equip each of the agencies with more information and data which will better enable them to analyze the small business impacts of regulations.

As Senator Dodd mentioned, several agencies have done a very good job at outreach. Certainly, the ICC, the Food and Drug Administration, and other agencies have really made, I think, an affirmative attempt to reach out more to the small business community. As has been said many times, small business people do not read the Federal Register, and it is absolutely necessary that when an agency faces an important decision affecting small business, that they examine it from the small business viewpoint.

One issue that we occasionally address, is an agency definition of "small business". I would like to state for the record that our office is more than willing to work with agencies to either help adapt to the Small Business Administration definition, or to create new definitions of their own.

I think that there are several very good examples of where regulatory flexibility is working well, and we list them in the testimony. I would like to just outline a couple. We have mentioned the Department of Labor; I think the Occupational Safety and Health Administration has been very much more sensitive to small business, not only in its regulatory activities, but also in its enforcement activities.

Senator HATCH. Has Mr. Auchter been handling that?

Mr. SWAIN. Yes, sir.

The Environmental Protection Agency has, I think, been very good at reaching out to small business. They have established a small business ombudsman office, and they have worked closely with our office on a number of issues which we think have an important small business impact.

The Department of Health and Human Services [HHS] is making a major change in its grants policy regulation which will have continuing long-term significance. The analysis that HHS has undertaken will make that change more effective as far as small businesses are concerned.

The Securities Exchange Commission has had two or three rulemakings in which they are taking a hard look at how some of their rules affect the ability of small businesses to go into the equity market. Particularly at a time like this, where the cost of credit is so high, I think it is important that small business be able to look at the equity side of the balance sheet as a financing mechanism. Unfortunately, in the past some SEC regulations have been perhaps more burdensome than they might have been. Not only has the SEC on its own opened up several rulemakings to address the small business financing problems, but also we have been able to do research and provide the SEC with some information which we think has contributed in a major way to the changes.

I would now like to comment on some other issues that arise as we monitor the Regulatory Flexibility Act. A key decision, of course, dictated by the Regulatory Flexibility Act is agency analysis of the small business impact of a rule. An agency can avoid a detailed analysis if the agency certifies when the rule is first proposed that the rule will not have a significant impact on a substantial number of small businesses. By and large, most agencies do so certify, and by and large, we do not have any reason to question this. The key point that we try to stress with the agencies is, when they perform that certification, they must publish in the Federal Register, not only for our examination but also for small business community examination, a succinct statement of the reasons for making the judgment. We think this point is particularly important, because if in fact a rule has no particular effect on small business, there is no reason to fuss with the analysis requirements of the Regulatory Flexibility Act.

We are continuing to work with agencies to improve their statements of the rationales behind their certifications.

Senator LAXALT. What is the track record so far? Are they using certification as a mechanism for a copout from discharging what otherwise would be their proper responsibility toward small business?

Mr. SWAIN. I would say that, by and large, the certification process is being used properly.

Senator LAXALT. It is working rather well?

Mr. SWAIN. By and large. Our records indicate roughly 90 percent of the rules that are published in the Federal Register are certified. A 90-percent figure is misleading. Although that figure may sound high, there are many examples where agencies continue with their rules. For example, there are 200 or 300 rules published each year by the Coast Guard for changing a buoy marker. These

proposals, quite obviously, do not require analysis. The area which frequently causes problems is certifications, where just by looking at a rule, we are unable to determine if the certification is indeed valid. We frequently ask an agency to provide some more information. We are not experts on all subjects in all the agencies' jurisdictions, and we do not ever want to establish ourselves as such. Therefore, we think it is important that when an agency certifies a rule that they provide the necessary succinct statement of the reasons for their decisions. In most cases, this is being done, but there is always room for improvement.

Senator LAXALT. Who does the monitoring on the certification, other than your office—someone in OMB, or in the White House? Who is charged with that responsibility? Is it entirely in your court?

Mr. SWAIN. It is primarily in our court, Senator. Sometimes, obviously, there is an overlap in the regulatory reform process between OMB and our office, due to Executive Order 12291, and the regulatory analysis requirements that S. 1080 would impose. The involvement of two agencies strengthens our hand, because it makes the agencies that much more attentive to the importance of regulatory analysis.

Senator LAXALT. But you are saying that certification thus far has worked reasonably well?

Mr. SWAIN. Reasonably well, but I want to again stress that this decision is the critical one. We have had, in about 10 percent of the rules, initial regulatory flexibility analyses made. Some of these have been very good; some of them, we think, are in need of improvement. Basically, however, any time an agency decides to do an initial analysis, that is a good mark in our book, because that means they are thinking about the impact of their regulations on small business. We have had situations where agencies that never before admitted that they had any particular impact or experience with small business are now aware of these efforts and are questioning their regulatory activities. The Federal Communications Commission [FCC] is a prime example. The FCC regulates a highly technical area, but they are being very aggressive in their outreach to the small business community to gather more information that can better inform them in their regulatory decisions.

I do think that the law is working reasonably well as far as our office is concerned. Not only are we seeing some successes, such as tiered regulations, but we are also seeing more attention paid by the agencies, in general, to small business. We certainly have an ample opportunity to get involved in a rulemaking stage because of the requirements of the Regulatory Flexibility Act.

Our office tries to pick and choose the rules which we feel are most significant to small business for our involvement, and we count upon the continued interest of the small business community and the Congress to help us examine an agency's overall record.

Your letter to us, Senator, asked us to make some judgments as to how the act is working or not working. There are a couple of areas where we think there is a need for improvement. Clearly, the subject of Senator Dodd's bill is an issue of controversy between our office and the Department of Defense. We take the position that under the law, as written, the Department of Defense's regula-

tions must be analyzed under the Regulatory Flexibility Act. I will not try to state what the counsel for the Defense Department will say, but, obviously, they disagree.

Senator LAXALT. But is it an open question? Are you saying that this part of the Regulatory Flexibility Act is open and ambiguous in terms of its applicability?

Mr. SWAIN. I think there are good arguments to be made on each side of the question.

Senator LAXALT. Do you think we should tighten it up or clarify it, if that is where we choose to go?

Mr. SWAIN. I think that some clarification is necessary. Obviously, the Defense Department takes the position that—I will let them state their own case—no clarification is necessary. The small business community, however, complains to us about the Department of Defense position.

Senator LAXALT. Well, are there other grounds? Do they contend that there is too great a workload in addition to the legal problems that they raised?

Mr. SWAIN. No; they have not. I am not aware that they have made any argument other than they are not legally required to comply with the act.

Senator LAXALT. Why don't they voluntarily comply, then?

Mr. SWAIN. In the procurement area, they sometimes do publish their regulations, and the IRS also, as Senator Dodd stated, sometimes publishes their regulations for comment. Basically, the situation is that certain IRS activities and the lion's share of the DOD activities are not covered under the Administrative Procedures Act, which the Regulatory Flexibility Act amends. Therefore, there is a question as to whether other law requires agencies to publish these rules which would trigger this sort of small business analysis.

Senator LAXALT. Well, are the original policy questions that exempted them from the provisions of the Administrative Procedures Act still valid in your estimation?

Mr. SWAIN. Well, the original Administrative Procedures Act was passed in 1946, so I am not sure that I am the expert on what those policy issues were at the time, but I think it is certainly important to reassess those policy questions before any change is made. Nonetheless, I think that, speaking from the standpoint of the small business community, it is important that the Department of Defense and the Internal Revenue Service take a look at the small business impact of their statements.

Senator LAXALT. I cannot think of two agencies which probably have greater impact on the small business community than these two. For the life of me, I do not see any reason why they should be exempted from this particular provision.

Mr. SWAIN. Well, I would be very interested in hearing their policy reasons. I am sure they are very sincere and good ones, and I think that they have to be weighed carefully against the necessity for analysis.

Senator LAXALT. I understand that. Would we be overloading their circuits, or yours, or ours, if we caused them to get into this at this early point?

Mr. SWAIN. I can only speak for my office, Senator. I do not think that they would overload our circuits. We do not pick over

every regulatory decision with a fine-toothed comb. As to whether they would overload their own circuits, I think it is in the public interest for an agency making a regulatory decision to make it carefully and explain it on the record as much as possible. I am sure that both agencies are capable of this requirement and are doing it to an extent now. There may be other good and valid policy reasons they may raise for not imposing this regulatory flexibility process, but I am waiting to see the discussion continue.

Well, Senators, in the course of our colloquy, I think we have touched on most of the points that I wanted to make in my statement. But I would like to reiterate that by and large, we see some genuine progress. It is terribly difficult to get a handle on the regulatory mass, and it is particularly difficult, I think, to try to pressure an agency into doing something that it might not otherwise not want to do. Certainly, I think that there are some people interested in the Regulatory Flexibility Act who expected that there would be an immediate and dramatic change; those who were not interested in it thought that it would not do any good at all. The act is somewhere in the middle. It is a clear congressional statement of interest in small business regulatory analysis, and I think that the agencies are attempting a good faith effort to comply with it. Clearly, in our office it is the major project. We have more people dedicated to the task of monitoring the Regulatory Flexibility Act than any other single function of our office. We are seeing some genuine progress, and we are seeing a continuing need to work with the agencies to help educate them on small business impact. I do welcome the continued interest of the Senate and the Senate Judiciary and the Small Business Committee, in particular. The oversight is very essential, not only to our success, but to the success of the agencies, as well.

If you have any questions, Senators, I would be happy to answer them.

[The responses to written questions from Senators Laxalt and Hatch and the prepared statement of Mr. Swain follow:]

RESPONSES OF HON. FRANK SWAIN TO WRITTEN QUESTIONS FROM SENATOR PAUL LAXALT AND SENATOR ORRIN G. HATCH

Question No. 1. Would you please explain in detail the steps your office takes to track a regulation through its various stages pursuant to Public Law 96-354.

Answer. Using carefully-prepared guidelines and procedures developed by senior staff members and professionals comprising the Advocacy Policy Group on Regulatory Flexibility, various members of the Advocacy Office staff review proposed rules and regulations that fall within the purview of the Act. There are four separate stages in the process which includes numerous checks to avoid or correct errors and to ensure that our review of proposed rules will progress smoothly and predictably from each stage to the next. Briefly, the stages are:

(1) "Monitoring:" Each day, my staff monitors the Federal Register to note any proposed rules or other actions potentially subject to the RFA.

(2) "Logging:" Once indentified, these rules (about 15 to 20 per day) are taken by the "Regulatory Flexibility Control Officer (RFCO), who logs them in, gives them an identification number, incorporates them into a file that is used throughout the remaining stages of the process as a repository for all significant actions, dates, signatures, documents, and the like.

(3) "Review:" Next, the Advocacy professional who monitors the agency that published the proposed rule reviews the file. This professional review is the heart of our process. The professional initiates action concerning the rule according to his/her judgment. Action may include informal communication with the agency, or interested trade associations; a letter to the Agency or formal comments in the rulemaking.

(4) "Follow-up:" After filing comments, the Advocacy professional monitors the process at the agency and participates in further proceedings as called for by the importance of any small business issues.

We have offered the use of the SBA microdata base for the OMB Office of Regulatory Affairs as well as to several individual agencies as a resource for determining the number and location of small businesses of particular types which may be affected by particular regulations. A major goal of this office is to increase the use of this database by other agencies involved in regulatory or other small business decisions.

Presently, we have automated many facets of the monitoring system, and we are implementing further improvements on a continuing basis.

Question No. 2. Has the Office of Advocacy, or any other entity, provided any guidance to the agencies on developing standards for an agency to determine whether a rule will have a significant impact on a substantial member of small entities?

(b) Which agencies, if any, have established rules or internal procedures to guide them in making those determinations?

(c) Do you generally agree with the procedures used by the agencies to make such determinations?

(d) What has been your experiences to date on how well agencies have determined whether a rule has a significant impact on a substantial number of small entities?

Answer. (a) The Office of Advocacy has taken several actions to assist agencies in determining whether a rule will have "a significant economic impact on a substantial number of small entities:".

1. We published a handbook explaining the RFA which has been broadly distributed to the agencies and public. This booklet was revised recently and includes detailed information to assist agencies in developing information on the issues of who are the affected small businesses and how are they affected.

2. Advocacy professionals consult with agency rule-writers on an on-going and informal basis.

3. We have provided detailed assistance to the EPA, the CFTC, and the FAA. The FAA is the only agency that has gone through an extensive analysis process and developed detailed size standards, different from SBA's, which reflect attention to the types of regulatory impact caused by FAA rules and the points where those impacts may affect smaller firms differently than large.

(b) FAA put out a procedural guide and rationale for size standard determinations. The Department of Interior, on December 24, 1980, F.R. 85376, published proposed internal agency guidelines, but later revoked them and has published nothing since then.

(c) Yes. Agencies most often use SBA definitions. Although we would prefer that agencies use a definition tailored to the regulatory scheme which they supervise—the law provides that agencies may use any of the SBA definitions which were established for loan or other purposes.

(d) Basically agency determinations are adequate. We anticipated that 95 percent of all rules would be certified and that has proved to be the case. Agencies that fail to make any certification or that fail to explain the reasons for certifying a rule will receive a letter from our offices or be contacted by an Advocacy professional.

Question No. 3. Do you support the legislative intent embodied in S. 2170? In your view, is a Congressional clarification of the application of the Regulatory Flexibility Act provisions to the "rulemaking" undertaken by DOD and IRS necessary? Do you have suggestions for amendments to the language that would accomplish the same goal?

Answer. Yes. The intent of the proposed legislation is in keeping with the activities that we have been urging DOD and IRS to undertake. The clarification of the intent of the Congress would be helpful to The Office of Advocacy. Although these agencies are not prohibited by the Administrative Procedure Act or any other laws from conducting notice and comment rulemaking and small business analyses, they do not voluntarily do so.

Question No. 4. What are the agencies' track record under the Regulatory Flexibility Act? In your view, are they adequately tailoring regulatory requirements to the size and resources of the businesses, organizations and the units of government being regulated? How do you know?

Answer. The track records of the agencies are, for the most part, good. It has taken some time for the RFA to become an established part of the rulemaking process, but now that agencies are aware of RFA requirements, the quality of rulemaking has improved. The regulatory environment has been one of deregulation in the last two years, and that fits in very well with the aims of the RFA. One way that we know that Regulatory Flexibility is working is from contact with individual small

business and trade associations who are beginning to see agencies who have begun to consider and act to account for the small business perspective.

Question No. 5. Most argue that "certifications" are not reviewable by the courts. Do you agree?

If judicial review is not available, what resources do you have available to ensure that agencies, like the Interior Department, issue complete, adequate, and accurate certifications?

Answer. I believe that certifications are reviewable as a part of the record as a whole. The full extent of reviewability is a question yet to be addressed by the courts. In addition to judicial review, the resource we have available to us to insure compliance with the RFA is our ability to garner public and government support for our point of view. We have found that once the regulated public, other affected government agencies, legislators and interested members of the executive branch focus on a rule and its negative impact on small business, the agency issuing the rule has a much easier time giving attention to the small business issues. Our coordination of public and private comments has been very useful to small business.

Question No. 6. The Regulatory Flexibility Act gives you general authority to monitor agency compliance with its requirements. Is this authority adequate to ensure that the agencies are complying with the requirements of the Act?

Does your authority allow you to remedy particular abuses in individual rulemakings as well as general agency noncompliance with rulemaking procedures?

Answer. Assuring agency compliance with the Act is a task involving my office, the Congress and the small business community. The monitoring role granted to this office by the RFA has been adequate for me to identify and assure correction of most questions raised by agency compliance. The monitoring authority has permitted us to report on overall agency performance and also to work with agencies in specific rulemakings. While my authority does not permit me to stay agency action, I have found that most agencies are willing to listen to any suggestions for improved compliance.

Question No. 7. We understand that the Department of Justice disputes the scope of your authority to participate as an amicus when an individual challenges a particular agency rule. What is your view on the authority of the Office of Advocacy to participate as amicus on a challenge to a particular agency rule?

In your opinion, does the Regulatory Flexibility Act give the Office of Advocacy authority to appear in any court of competent jurisdiction to present issues of both law and fact, including your views with resepct to the effect of a rule on small entities?

Please submit for the record copies of all documents, including inter-agency memoranda, concerning your discussions with the Justice Department on this issue?

Answer. Attached is a copy of the letter we have sent to the Department of Justice addressing the arguments that they have raised in relation to the Chief Counsel's role as amicus.

U.S. SMALL BUSINESS ADMINISTRATION,
Washington, D.C.

Hon. J. PAUL MCGRATH,
Assistant Attorney General, Civil Division, U.S. Department of Justice, Washington, D.C.

DEAR MR. MCGRATH: The Regulatory Flexibility Act (RFA), P.L. 96-354, authorizes the Chief Counsel for Advocacy of the U.S. Small Business Administration to appear as an amicus curiae in any Federal court action brought to review a rule.[1] The Department of Justice has questioned both the constitutionality and scope of this authority. We believe that the Department's position is incorrect. This letter sets out the legal basis supporting the Chief Counsel's full amicus authority.

I. THE CHIEF COUNSEL'S AMICUS AUTHORITY IS CONSISTENT WITH AUTHORITY GRANTED OTHER FEDERAL AGENCIES

Congress, unless otherwise provided by statute, has entrusted the rights of representation of the United States, its agencies and officers, before the U.S. District

[1] Public Law 96-354 provides in pertinent part: "(b) The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as amicus curiae in any action brought in a court of the United States to review a rule. In any such action, the Chief Counsel is authorized to present his views with respect to the effect of the rule on small entities." 5 U.S.C. § 612(b).

Court, in the Department of Justice under the direction and control of the Attorney General 28 U.S.C. §§ 516, 519.[2]

The Department argues that the Chief Counsel's amicus authority violates the constitutional principle of separation of powers. This contention is contrary to Congress' authorization of numerous encroachments by the administrative agencies on the Department's authority to control litigation, especially since 1970. Congress has carved out exceptions to the extent of making an executive agency (such as SBA) an actual party in charge of the litigation. For example, Public Law 92-576 (33 U.S.C. § 921a) provides that attorneys appointed by the Secretary of Labor "shall represent" the Secretary or the Benefits Review Board in actions under the Longshoremen's and Harbor Workers' Compensation Act, except for proceedings in the Supreme Court. Similarly, Public Law 93-259 (29 U.S.C. § 216(e)(2)) authorizes the Secretary of Labor to enforce the child labor provisions of the Fair Labor Standards Act by recovering civil penalties and requires the Secretary to be represented by the Solicitor of Labor: "The Secretary shall be represented by the Solicitor of Labor."

Congress has also provided other administrative agencies with the more limited, amicus curiae authority in Federal cases brought by the Department. The authority conveyed to Federal agencies by the Antitrust Penalties and Procedures Act (15 U.S.C. § 16), Public Law 93-528, is nearly identical to Advocacy's authority under the RFA. Section two of the Act relates to the process by which Department-proposed consent decree settlements are entered by judicial action. Subsection (e) of this Section outlines the public interest factors to be considered by a Federal court before the proposed consent decree can be entered. Subsection (f) allows the court, in making its determination under (e), to: *"authorize full or limited participation in proceedings before the court by* interested persons or *agencies, including appearance amicus curiae,* intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, *or participation in any other manner and extent which serves the public interest* as the court may deem appropriate . . ." (emphasis added). 15 U.S.C. § 16(f)(3).

This statute, then, allows other Federal agencies to appear as full intervenors or as amicus in those cases where the Department is necessarily and unmistakably a party representing the Executive Branch.

Importantly, this statute makes no distinction between types of "agencies." Therefore any executive or independent agency has the authority to appear as amicus or even a full party.

Furthermore, the Department of Justice raised no constitutional objections in its comments provided to the Congress on this legislation.

Congress expressly authorized the Chief Counsel for Advocacy of the Small Business Administration in the RFA to appear as an amicus curiae in any court action brought to review a rule. 5 U.S.C. § 612(b). The legislative history reveals Congress' intent that the Chief Counsel appear independently of the Department:

"Section 612(b) authorizes the Chief Counsel for Advocacy . . . to appear as amicus curiae in any action brought to review the legal validity of a rule . . . The Chief Counsel currently has the right to appear in Federal agency proceedings. . . This section extends that right to include appearance in Federal court proceedings also." 126 Congressional Record 1980, S. 10943 (August 6, 1980).

The Chief Counsel's involvement as an amicus therefore, does not run afoul of the Department's authority under 28 U.S.C. §§ 516, 519 because it is clearly "otherwise authorized by law." The history of 28 U.S.C. § 516 reveals that the "otherwise authorized" language was included to provide for existing and future exceptions, such as those mentioned above. The Department historically has not objected to similar statutes on the grounds of unconstitutionality. The amicus authority in the RFA raises no special problems.

II. THE CHIEF COUNSEL'S AMICUS AUTHORITY DOES NOT VIOLATE THE PRINCIPLE OF SEPARATION OF POWERS

The Department argues that to permit the Chief Counsel to appear as amicus in a Federal court action challenging an agency rule allows an Executive agency to

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[2] "*Except as otherwise authorized by law,* the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General." (emphasis added). 28 U.S.C. § 516.

"*Except as otherwise authorized by law,* the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States Attorneys, Assistant United States Attorneys, and special attorneys appointed under Section 543 of this title, in the discharge of their respective duties." (emphasis added). 28 U.S.C. § 519.

speak with a voice conflicting with that of the President. It is further argued that Congress' vesting of amicus authority in the Chief Counsel is violative of the separation of powers doctrine. The Department alleges that granting the legislative branch the power to limit the Executive's control over the policy advocated by an agency head subject to removal violates this constitutional principle. We believe this argument rests on an overly narrow view of the constitutional separation of the three branches of government that is not supported by the case law, including the Supreme Court decisions cited by the Department.[3]

In 1935, the Supreme Court held that "each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others . . ." *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). However, the Supreme Court has recently adopted a more flexible view of the division of authority between the co-equal branches, one that rejects the notion of three airtight departments of the government. *United States* v. *Nixon*, 418 U.S. 683, 707 (1974); *Nixon* v. *Administrator of General Services Administration*, 433 U.S. 425, 433 (1977).

Nixon v. *Administrator of General Services Administration* supra, sets out the test for determining whether an impairment of the functioning of one branch is so serious as to constitute a violation of the separation of powers doctrine:

"The proper inquiry focuses on the extent to which it [the impairment] prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." Id., citing *United States* v. *Nixon*, supra at 711–12.

The Supreme Court upheld a lower court finding that the Act's regulation of the Executive's control over the disposition of certain Presidential materials did not violate such a doctrine. Id. at 441. The Court further held that the Executive Branch actually became a party to the Act's regulation when signed by President Ford and supported in court by President Carter. Id. Following the *United States* v. *Nixon* test for weighing the potential disruption on a co-equal branch, the Court reasoned that since the Executive Branch (through GSA) remained in full control of the Presidential materials, there was nothin , unduly disruptive of Executive authority and hence, no violation of separation of powers, Id. at 443–44.

In the present case, the authority granted the Chief Counsel by Congress in section 612(b) of the RFA is so limited as to not impair or disrupt the Executive functions as a party to the suit challenging the rule. The authority granted the Chief Counsel is limited to that of an amicus, with no control over the direction of the litigation. The litigation authority clearly remains with the Attorney General, representing the defendant agency on behalf of the Federal government. At the outset of such an amicus appearance, the Chief Counsel would always inform the court that he appears in his special role as Chief Counsel for Advocacy and not on behalf of any agency of the government.

Although it may be arguable whether Congress could have constitutionally impaired the Executive to the point of allowing the Chief Counsel to intervene as a full party, they instead chose the lesser, amicus, role. This role is certainly no more disruptive than the roles given other Federal agencies in the statutes mentioned earlier. Indeed, this authority is not an intrusion or disruption on the Executive at all, since the Chief Counsel appears only to add to and clarify the legal and factual issues for the court as they relate to small businesses. Based on the test established by the Supreme Court, it follows that the amicus authority granted the Chief Counsel does not violate the separation of powers doctrine.[4]

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[3] In making the argument that speaking with two voices, even if one is that of a limited party (amicus), threatens the faithful execution of the laws, the Department's memorandum cites various constitutional cases, none of which appear to support their proposition. The cases cited support propositions which we do not question, such as:

1. Executive Branch officials serve at the pleasure of the President;
2. The Chief Counsel's Office is a position within the Executive Branch, subject to removal at will;
3. The laws must be faithfully executed by the Executive Branch; and
4. Essentially different powers of government cannot be placed in one branch of government.

[4] It is difficult to postulate a separation of powers violation when agencies appear before courts when there are countless examples of executive agencies offering different legal views in administrative proceedings presumably posing no such difficulty.

III. EXECUTIVE ORDER 12146 DOES NOT APPLY TO THE CHIEF COUNSEL'S ROLE UNDER THE RFA

The Justice Department has alleged an additional barrier to Advocacy's proper role. E.O. 12146 directs that the Attorney General set all legal policy for the Federal government. Section 1-402 of that Order provides that "[W]henever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, . . ." The Department does not believe that the RFA supersedes this Order. We disagree. To the extent the Order is based on statutes placing litigation authority and control in the Attorney General (28 U.S.C. §§ 516, 519), the RFA (5 U.S.C. 612(b)) must control because of its later date of passage and its being "otherwise authorized by law." In approving the RFA on September 19, 1980, President Carter approved the amicus grant of authority and extended the Chief Counsel's important administrative level role to the Federal court arena. (See also *Nixon* v. *Administrator of General Services Administration,* 433 U.S. 425 (1977): Presidential Recordings and Materials Preservation Act's regulation of Executive function in the control of Presidential materials does not violate separation of powers since Executive Branch became a party to the Act when signed by President.)

IV. RFA GRANTS FULL AMICUS AUTHORITY TO THE CHIEF COUNSEL

It remains to set the parameters of the Chief Counsel's amicus role. It is well settled that an amicus curiae is one who gives information to the court on some matter of law in respect to which the court is doubtful. 4 Am. Jur. 2d 109. The term ordinarily implies the friendly intervention of counsel to call the court's attention to a legal matter which has escaped or might escape the court's consideration. Id. The principal function of an amicus, therefore, is to aid the court on questions of law. Id. at 110-11.

The Chief Counsel's role in any Federal court litigation brought to challenge a rule is not that of a full party. As an amicus, the Chief Counsel appears to provide the court the benefit of his expertise on issues raised under the statute granting him standing, the RFA. Congress clearly intended this judicial role as an ancillary and necessary function of the Chief Counsel's "Regulatory Flexibility" duties:

"This judicial role complements [the Chief Counsel's] current role as the primary Federal regulatory watchdog for small business at the . . . rulemaking stage.

"Courts should profitably draw from the considerable experience and expertise of the Chief Counsel in considering the uncharted waters of this regulatory reform." Congressman Butler, 126 Congressional Record, 1980, H 8473, September 8, 1980.

Notwithstanding this clear intent, it has been suggested by the Department that the scope of the Chief Counsel's role as an amicus is somehow limited by the second sentence of section 612(b): "In any such action, the Chief Counsel is authorized to present his views with respect to the effect of the rule on small entities." The Department suggests that this limits the Chief Counsel to discussing only factual impacts of the rule. The sentence does not say that the Chief Counsel may articulate only his views with respect to small entity impacts. He is simply "authorized" to present views "with respect to" such impacts. This overly narrow view is at odds with not only the historical role of an amicus and the clear intent of Congress, but also with traditional administrative procedure.

In any action to review a rule, a Federal court is concerned with both an agency's compliance with procedural requirements and the reasonableness of the agency action. Courts are not to conduct de novo fact findings at this stage.

Therefore, in order to have amicus role at all, the Chief Counsel must be able to add light on the reviewable issues. To limit the Chief Counsel to a mere factural discussion of the effect of the rule on small entities may leave him arguing points outside the record and beyond the court's scope of review. If the Chief Counsel is limited solely to reciting facts in the record, without any reference to appliance law, his brief would hardly be useful to the court. Furthermore, it would be a largely futile exercise to limit the Chief Counsel in litigation to a recitation of facts where his legal and factual comments are already part of the administrative record. The Chief Counsel's involvement must therefore be that of the traditional amicus, with the ability to address questions of law and mixed questions of alw and fact, if his role is to be at all relevant.

V. CONCLUSION

The long legislative history of the RFA emphasizes the special role of the Chief Counsel an advocate for the entrepreneur's interests before Federal agencies. Section 612(b) of that Act simply extends the role of the Chief Counsel for Advocacy to judicial as well as regulatory settings. There is no evidence or rationale that Congress intended to limit the role of the Chief Counsel in judicial proceedings. Nor are there any barriers, constitutional or otherwise, to the full, traditional, amicus role envisioned by the RFA. Finally, public policy is better served by allowing Federal courts the opportunity to hear from the agency specially created to speak for small business. The additional voice of the Chief Counsel for Advocacy, as an amicus curiae, will add both small business perspective and reasoned analysis to the review of an agency action and will not interfere with the ability of the Executive Branch to fulfill its mandate.

I look forward to an early resolution of this issue and to your reply.

Yours sincerely,

FRANK S. SWAIN,
Chief Counsel for Advocacy.

Question No. 8. (a) Has your office sought to intervene as amicus in any other Regulatory Flexibility Act court proceeding?

(b) In your review, must the Office of Advocacy seek the approval of any other agency or official prior to petitioning a court to appear as amicus?

(c) Has the Department of Justice, or any other agency or official sought to prevent the Office of Advocacy from petitioning to intervene as amicus?

(d) Are there any indications that the Department of Justice, or any other agency or official, would seek to prevent the Office of Advocacy from petitioning to intervene as amicus, in the future?

Answer: The only case where the amicus participation has been considered is *Thompson* v. *Watt* in the District Court for the District of Columbia. Our interpretation of our amicus authority is addressed by our letter to the Department of Justice.

Question No. 9. Do you have any reasons to believe that your statutory authority to participate as an amicus is legally or Constitutionally infirm in any respect?

Answer. No. Again, see our memo to the Justice Department.

Question No. 10. (a) Do you think that Congress needs to clarify any element of your authority to appear as an amicus in Regulatory Flexibility Act cases?

(b) Do you think the Congress needs to clarify any other elements of judicial review of agency actions under the Regulatory Flexibility Act?

(c) Other than the issues raised in S. 2170, judicial review of agency actions, and your standing as an amicus, are there any other statutory or implementing impediments to the Executive Branch's full compliance with the Congressional intent behind the enactment of Regulatory Flexibility Act?

Answer. (a) No.

(b) I believe that the Congressional intent is very clear in the statute. However, if the courts rule against judicial review, some clarification may be necessary of regulatory flexibility procedures.

(c) No.

Question No. 11. How does your role as an amicus differ from that of a "party" in Regulatory Flexibility Act proceedings?

Answer. Our role as an amicus under the RFA is that of an amicus in any other proceeding and differs from a full party in the same ways. Obviously, our participation is not required and we are not required to address all the issues in the case. Our role is to advise the court of the small business implications of the agency activities, issues which are raised in the context of reviewing the agency's use of the Regulatory Flexibility Act standards in their rulemaking.

Question No. 12. What is the procedure for the Chief Counsel to appear as an amicus in U.S. District Court?

Answer. The only formal procedure that we would be required to follow is to notify the Court that we intend to file an amicus brief. In addition, we would expect to notify the parties to the lawsuit, particularly the Department of Justice or other Federal agencies involved that we intend to participate. In that way if there are issues that can be resolved outside of the review process, the court case can be avoided or reduced to fewer issues.

Question No. 13. Section 610 of the Regulatory Flexibility Act provides for the review of existing reviews within ten years. In his March, 1982 report on the "State of Small Business" the President indicated that he will direct each agency to step up completion of the review of existing regulations from ten to five years. Is this

timetable realistic? How is or will your office be involved in the agency's periodic review?

Please provide a copy of all memorandum or other document from the President or any other agency or official which implements the President's intended directive that agencies are to reduce the time period for completion of existing regulations.

Please provide a copy of all memorandum or other documents from the President or any other agency or official which implements the President's directive to the Comptroller of the Currency, and chains of the Federal Home Loan Bank Board, FDIC, and Federal Reserve, that these agencies follow the Regulatory Flexibility Act guidelines for assessing the small business impact of their proposals for changing the Nation's financial institutions.

What actions have specific agencies taken, if any, to establish a timetable to comply with the President's directive?

Will either the President's directive for a five year review, or the Regulatory Flexibility Act's 10 year statutory review, be applicable to the Internal Revenue Service's tax code regulations or the Defense Department's procurement regulations?

Answer. The five-year timetable is realistic. What our office will do is to provide agencies with small business data to better allow them to target rules which impact greatly upon small business. We will handle rule reviews as we do any other proposed rules with a significant impact on a substantial number of small business. We will alert the small business community and submit formal or informal comments to the agencies during their rule review process.

Most agenices have published periodic review plans as they were required to last year but, as yet, no significant reviews have been performed, I anticipate that some rules will be targeted for review when agencies publish their semi-annual agendas in October.

The rule review process under Section 610 covers all rules regardles of exceptions contained in Section 533 of the APA. However, when rules are changed in response to the reviews, they must be treated as a new proposal and would be published in the Federal Register for notice and comment only if the APA applies. In other words, agencies must review all rules but they only need to publish for notice and comment those proposals to change rules which are covered by the APA.

No agency has published a 5-year periodic review plan to date. We believe that the review plan provisions of the Regulatory Flexibility Act apply to interpretive rules of the IRS and to procurement rules of the Defense Department.

Question No. 14. In addition to employees of the Office of Advocacy or SBA, what additional resources does your office use, if any, to assist in the monitoring of agencies' compliance with the Regulatory Flexibility Act?

Answer. We rely heavily on small business and the small business trade associations to assist us in our monitoring activities. Although we are aware of every rule which is proposed in the Federal Register, outside groups provide us with specific information about rules in the preproposal stage.

Question No. 15. What is the status of the Regulatory Flexibility Task Force that was created by the Office of Advocacy under the previous Administration?

Answer. The Regulatory Flexibility Task Force created in 1980 is not active at this time.

Prepared Statement of Frank S. Swain

Chairman Laxalt and Chairman Hatch,

I am pleased to appear before the joint meeting of your subcommittees this morning to discuss the Regulatory Flexibility Act (RFA). I am especially happy to be appearing before both Chairmen since they were early sponsors of the regulatory flexibility concept. As head of the office charged to monitor government-wide compliance with the provisions of the RFA, I am encouraged whenever the Congress shares an interest in the regulatory problems of small business. My statement this morning reflects my views and not necessarily those of the Administration.

The RFA has been in effect for about a year and a half and I think its underlying principles have begun to take hold in the agencies. Much has been accomplished, but as always, more needs to be accomplished.

The problem of overburdensome regulation of small business is certainly well-recognized and RFA is but one response to the call for solutions. States also are recognizing the need for regulatory analyses geared toward more precise rulemaking. To date at least eight states have enacted regulatory flexibility statutes and legislation is pending in at least ten others.

MAJOR GOALS OF THE REGULATORY FLEXIBILITY ACT

The fundamental goal of the Regulatory Flexibility Act (RFA) is to insure that Federal regulation is imposed on small entities only to the degree necessary to meet the statutory requirements of substantive legislation. Imperative to meet this goal is agency awareness and understanding of the impact of their regulations on small business in conjunction with their commitment to communicate their information, assumptions, and analyses to the regulated public. When agencies filter regulatory efforts through a small business lens, they will then be able to provide regulatory relief and, at the same time, place the regulatory scheme on more sound footing. By drafting regulations narrowly to regulate only to the extent that is absolutely necessary, compliance will

improve and costs will decrease. In addition, small business' negative attitude toward government regulations would diminish once they are convinced that their position is understood and better efforts are made to balance the burdens with the regulatory purpose.

RFA calls on agencies to integrate small business thinking into all of their regulatory planning. They must actively seek out data and opinion to understand small business impacts and to incorporate them into the developmental stages of their rulemaking activities. Agencies must then communicate their findings to the affected parties and finally, make every possible attempt to lessen or eliminate regulatory burdens on small entities.
Quite simply agencies must:

a. announce regulatory plans as far in advance as possible;
b. analyze regulatory activity in terms of its impact on small business; and
c. tier or otherwise alter their regulations to minimize their impacts on small business.

Increased Agency Awareness

The most prospective aspect of the RFA is the requirement that agencies publish semi-annual agendas (§602) and periodic review plans (§610). The semi-annual agenda is intended to give small entities up to six months notice that an agency is going to propose a rule that could have a significant impact on them. This six-month period allows for meaningful discussions with agency officials as well as time in which to gather information to submit during the comment period following the formal proposal.

The periodic review plan provision requires that agencies publish a plan under which they will review all existing regulations to assess their impacts on small entities. In making this assessment agencies must consider the continued need for the rule, the complaints received, the complexity of the rule, the extent to which the rule is duplicative of other Federal, state and local rules, and the length of time and advances that have occurred since the rule was enacted. The

importance of review plans is so great that the President, in his message on "The State of Small Business," published in March of 1982, stated that agencies should perform this review in five years, rather than the ten dictated by the RFA. This may be the hardest challenge of the RFA over the next several years. Trying to dislodge entrenched regulations and change the perception that "the old way is the best way" has frustrated every Administration.

The periodic review plans, which have been published by agencies are, for the most part, excellent in the thoroughness of their approach and the extent to which they attempt to target small entity impact. (See Appendix A for a list of agencies which have published periodic review plans.) However, thus far the review of existing regulations has not really gotten to a result phase in most cases. Agencies have provided us with adequate regulatory review schemes but very few rules have been reproposed for comment pursuant to this requirement.

As I stated earlier, the provisions for a semi-annual agenda and a five-year review plan provide adequate time for input from small business on the impact of future and current regulation. RFA goes one step further, and, through §609, urges agencies to insure that affected small entities have actual notice of proposals which will impose, change, or withdraw regulations governing them. Agencies have used various techniques for meeting this requirement.

As part of the outreach effort, the Office of Advocacy published and distributed "The National Trade Association Directory" to the agency regulatory flexibility officers. This Directory identifies more than 700 trade associations, representing all aspects of the small business community. Each trade association is classified according to the business characteristics of its membership and membership size. I believe it is a good tool to help the agencies notify affected businesses of the impact of their regulations.

For example, the ICC has an effective outreach program, printing notices of proposed rulemakings in trade journals and, on occasion, holding conferences to advise participants of recent regulatory developments. Of special note is the procedure of the Commission's Small Business Assistance Office, which has a computerized mailing list of small and minority carriers and transportation

organizations representing small businesses. When the ICC puts out a notice of proposed rulemaking or takes other actions which impact upon small businesses, copies of these actions are sent directly to small businesses and small business organizations. This builds into the system adequate time to receive comments from the regulated community.

The Department of Transportation has used a similar list to mail copies of its semi-annual agendas to small businesses and solicit comments upon them.

Another example is the publication "A Small Business Guide to the FDA", which is published by the FDA. A total of 35,000 copies are being distributed nationwide to small businesses and trade associations. Although no mention is made of RFA in the pamphlet, it is a good effort to instruct small businesses on how to participate in the FDA regulatory process.

Inherent in agency programs to inform the public of their activities is the way in which agencies notify and train personnel in the necessary RFA compliance procedures. Most agencies have designated regulatory flexibility officials and some have issued written directives to instruct staff on RFA implementation. Some agencies which have issued internal compliance memoranda are ICC, EPA, and DOT. The Department of Interior issued guidelines early in 1981, but withdrew them in efforts allegedly aimed at "deregulation."

One other area in which agencies must develop and utilize small business awareness is in their size standards determinations. As you well know, agencies, when examining rules to determine small business impact, may use SBA size standards or, after consultation with SBA's Office of Advocacy, devise different size standards. For the most part agencies are using SBA definitions, which are written for SBA program purposes. One agency, the FAA, developed its own size standard based on the unique characteristics of the aviation industry and the differential impact of FAA regulations on that industry. I am hopeful that more agencies will look to this kind of definitional development but, as yet, there is little evidence that this is occurring. I believe that it is the intent of the RFA that agencies look for relevance in size standards. This goal

should be better addressed as agencies learn of available sources of business data and when the SBA data base is complete. Our reissuance of the publication entitled "Better Federal Treatment for Small Entities" discusses the availability of business size data in some detail.

So far my testimony has focused on those sections of the RFA that attempt to change and mold agency attitude toward small business. This process is focused on agency activity that occurs before the publication of proposed rules. I will now discuss the required agency activities in issuing a rule.

Agency Discussion of Regulatory Proposals

The critical decision point for an agency when promulgating rules subject to the RFA is whether the proposed rule has a "significant impact on a substantial number of small entities." Once that question has been answered, an agency's course of action is clear. If there is not a significant impact on a substantial number of small entities, an agency head can so certify and does not have to do further regulatory flexibility analysis until preparation of the final rule. If the impact is significant, an agency must perform an initial regulatory flexibility analysis.

I would like to emphasize at this point that from our monitoring position in the Office of Advocacy, the certification decision is the most crucial one. For example, during the months of October and November of 1981, 284 rules subject to RFA were published in the Federal Register. Of these, 264 were certified correctly, 4 were certified incorrectly and 16 were published with initial regulatory flexibility analyses. These numbers show that for 93% of all proposed rules the initial assessment of regulatory impact is the most important regulatory flexibility decision an agency must make. From our experience we have found that once an agency has decided that an initial regulatory flexibility analysis is necessary, the analysis is, for the most part, fairly extensive and is a good faith attempt to thoroughly analyze the small entity impact and to consider possible alternatives.

We have not found the same care and precision present in agencies' attempts to certify rules as having no significant impact. One of our biggest problems in

monitoring certifications is the agency's failure to include in its certification statement a succinct statement of the reasons behind the decision. Without this statement, we, as well as members of the small business community, are unable to make even the most cursory assessment of the propriety of the decision. The failure of an agency to explain the reasons for its certification decision is more serious when it is used to avoid the more extensive analysis required in an initial regulatory flexibility analysis.

For example, the Department of Interior frequently provides no explanations for their certifications, despite the RFA requirement to do so. Moreover, several rules published by the Department of Interior with certifications do, in fact, have significant impacts on small business and, therefore, in our opinion, require initial regulatory flexibility analyses. Some examples are their proposed rules on oil and gas leases, oil and gas conversions, forestry products and access roads regulations from the Office of Surface Mining. Other offices and agencies do not always provide the explanation for their certifications. No information has led us to assume that many certifications were not accurate, but without an explanation of the certification, it is only a guess on our part as to whether the certification is appropriate.

The agencies appear to understand the purpose and requirements of the RFA and mesh their research well with that required by E.O. 12291. The major role for the Office of Advocacy has been to urge the preparation of initial regulatory flexibility analyses, when required, and to examine them upon completion to insure that the analysis is thorough and that all known, reasonable alternatives are addressed. We have examples of good initial regulatory flexibility analyses which we would be happy to provide for the record if you wish.

Like an initial regulatory flexibility analysis, the purpose of a final regulatory flexibility analysis is to provide to those who are interested the reasons for and the effects of a given regulation. RFA gives no authority to anyone to mandate that rules which negatively affect small entities be withdrawn, but it clearly requires that the rationale for the selection of a particular method of regulation be explained in public view. If a final rule will not have a significant impact on a substantial number of small entities, the agency should certify that conclusion.

Although RFA does not override any other legislation and does not require agencies to follow any directions other than the procedural ones contained in the Act, it requires that regulatory alternatives consistent with the stated objectives of applicable statutes be taken into consideration by rulemaking agencies. These regulatory alternatives must be weighed in the analysis of the proposal. This tiering of regulations is the soul of RFA. After all the analysis and all the Federal Register explanations, the overall purpose of RFA is to reduce small business' regulatory burden. There are some successes.

1. Under a proposed rule published on January 26, 1981, by the Environmental Protection Agency, small business would be exempted from some of the reporting requirements of Section 8(a) of the Toxic Substances Control Act. The Office of Advocacy participated in the rulemaking by working with EPA and affected industry groups to ensure the proposal's sensitivity to the many small businesses subject to the proposed regulation. These exemptions were part of the final rule issued on July 30, 1982.

2. On March 19, 1982, the Occupational Safety and Health Administration (OSHA) proposed its Hazard Communication rule which is designed to inform employees of chemicals present in the workplace. In keeping with the spirit of regulatory flexibility, OSHA proposed to phase-in the effective date of the proposal based on the size of the chemical manufacturer, the composition of the manufacturer's products, (i.e. whether it is a pure or mixed substance), and whether or not the employer is a manufacturer or chemical user. The currently proposed rule is more performance-oriented than its predecessor. The Office of Advocacy did file comments to OSHA expressing reservations about several provisions where we thought OSHA could have done more to take into account the uniqueness of small business within the industry.

3. On June 2, 1982, the Federal Energy Regulatory Commission proposed a rule concerning the "Fees Applicable to the National Gas Policy Act". Within the initial regulatory flexibility analysis, the agency proposes to "reduce or eliminate fees with respect to small business."

4. The EPA is reportedly ready to re-issue a proposed regulation concerning lead phasedown. The Office of Advocacy was instrumental in bringing to EPA's attention the special needs of small refiners subject to the regulation. Although the small business impact was not properly addressed in the initial proposal of February 22, 1982, we hope that the new proposal will contain provisions reflecting a sensitivity to the small refiners. I will discuss this particular regulation in greater detail later in my testimony.

5. On December 3, 1981, the Department of Health and Human Services proposed a modification of its grants policy to allow for-profit organizations to participate in their grant program. Many of these for-profit organizations likely to submit proposals are small businesses. The Office of Advocacy questioned the validity of the Department's certification. In response, HHS has agreed to review the small business impacts of its proposal in order that a proper evaluation can be made.

6. In response to the Small Business Investment Incentives Act of 1980, on October 27, 1981, the SEC proposed a new series of rules called Regulation D and solicited comments on this proposal last year. The Office of Advocacy sponsored research to gather pertinent information of the effects of existing SEC registration requirements on small business and submitted the findings to the SEC in accordance with the RFA. To the SEC's credit, many of Advocacy's comments now appear in the adopted version of Regulation D, which became effective April 15, 1982.[1]

7. One of the best examples of regulatory flexibility is the Office of Federal Contract Compliance Programs' (OFCCP) affirmative action proposals of August 25, 1981. The Office of Advocacy commended the OFCCP for providing an exemption for businesses from the burdensome affirmative

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[1] The Office of Advocacy is cosponsoring with the SEC a seminar on capital access for small firms, which will discuss Regulation D and other current small business securities issues on September 23-25, 1982.

action plans while properly keeping a balance with the responsibilities of Executive Order 11246. Of the 17,000 government contractors presently required to devise an affirmative action plan, over 12,000 small businesses would have been exempted from preparing a written plan. Despite the reduced number of covered employers, 97 percent of all employees of government contractors would still have been covered by a written affirmative action plan. This proposal is still pending.

8. The Department of Labor (DOL) proposed revisions to the regulations which implement the Davis-Bacon Act on August 14, 1981. In response to the proposal, the Office of Advocacy conducted a survey of the effects of the Davis-Bacon Act on small construction firms. This survey accompanied our comments forwarded to the DOL which suggested that the DOL make even greater revisions to the regulations. DOL published the final rules in May of 1982 and, in accordance with current industry practice, altered the helper-to-journeymen ratios allowed on construction sites along the lines suggested by the Office of Advocacy. The outcome of these efforts, however, is uncertain because the final regulations have been challenged in court.

9. The Office of Advocacy questioned the validity of the FAA's certification of no impact for a proposed Parts Manufacturers Approval rule published January 15, 1981. The FAA certified that the proposal would not exert a significant impact on small business. Advocacy commented that the proposal will adversely and disproportionately affect those small businesses engaged in the independent manufacture of replacement parts for aircraft systems under authority granted by the FAA, and requested further analysis by FAA before a decision is made. That rulemaking is still pending and was the subject of recent hearings before the House Small Business Committee.

10. On March 10, 1981, the Securities and Exchange Commission proposed to define "small business" and "small organization" for use in reference to the reporting provisions of the Securities Act of 1934 as an issuer whose assets were $2.5 million or less. The Office of Advocacy recommended that

a much higher dollar threshold was appropriate. On February 4, 1982, the SEC published its final small business definition rule. The new threshold for the reporting requirement at issue is $3 million. We think the SEC could have raised the threshold more, but they clearly made progress from their initial proposal.

My remarks to this point have been rather general but there are some issues that I would like to address in greater detail. Although I think RFA is working well in general and feel confident that it has had a noticeable and positive effect on Federal rulemaking, I would, however, be doing the members of the Committee a disservice if I did not discuss certain problems.

Problems Encountered in The Regulatory Flexibility Act Enforcement

One of the most significant problems we face is the exclusion of a substantial body of regulations from coverage of the RFA. The language of RFA currently limits coverage to rulemakings required under Section 553 of the Administrative Procedure Act (APA) or any other law. The APA does not cover rules that involve a military or foreign affairs function of the United States; a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts; an interpretive rule, general statement of policy or agency organization, procedures or practices; or a situation when the agency finds for good cause that the procedures are impracticable, unnecessary or contrary to public interest unless another law applies. Because the RFA also applies to rules issued when notice and comment is required by "any other law," the exemptions of the APA are narrowed in particular circumstances. The most serious problems for small business occur when the Department of Defense and the Internal Revenue Service use this language to avoid making small business analyses of some of their key regulatory actions. Their reasons are different and I will, therefore, discuss each of them separately.

The Department of Defense (DOD) has consistently taken the position since passage of the RFA in 1980 that it issues no regulations subject to RFA.

In response to an Advocacy inquiry on the subject in 1981, Assistant General Counsel Dennis H. Trosch informed our office that the APA does not require

notice and comment rulemaking for procurement regulations, and that "no other law" requires DOD to publish a notice of proposed rulemaking. Mr. Trosch was referring in the first instance to the contract exemption to notice and comment rulemaking contained in section 553(a)(1) of the APA, and in the second instance to section 603(a) of the RFA which applies the provisions of the RFA to all notice and comment rulemaking required by the APA or "any other law."

The Office of Advocacy believes that DOD is in error in their position in the matter. Amendments to the Office of Federal Procurement Policy Act in 1981 required the Administrator of OFPP to establish criteria for the development of procurement regulations which would include notice and comment procedures. On December 30, 1981, OFPP issued a policy letter, applicable to all agencies, which required notice and comment procedures to be followed in development of procurement regulations. The Office of Advocacy therefore, takes the position that DOD must comply with RFA whenever it engages in procurement rulemaking.

The importance of the RFA procedures to small business is demonstrated in a recent DOD proposed rule. DOD announced that beginning July 1, 1982, DOD solicitations for products entering the DOD logistics system would require a "3 to 9" bar code marking to be affixed on "unit of issue" packs and shipment containers. This project, called LOGMARS (Logistics Applications of Automated Marking and Reading Symbols), was imposed throughout DOD in a rather hasty manner and without due regard to the substantial adverse impact this new labeling requirement would have on small businesses.

The small business community has been caught by surprise by the LOGMARS project. The first notice of the project was in an easily overlooked paragraph entitled "DOD Packaging and Labeling Specifications" which appeared on the last page of the April 22, 1982 issue of the Commerce Business Daily (CBD). Most small businesses who might deal with DOD had no idea of this impending requirement until about the time of the July 1, 1982, effective date when notices from contracting activities were issued. Few small businesses have had time to prepare to meet this new bar coding requirement.

It cannot be denied that these amendments to the Military Standards, which are regulations, would impose a "substantial economic impact on a number of small entities." Whether to bar code or not is not the question for the Office of Advocacy. The key issue is that had DOD been required to promulgate the changes according to APA-type notice and comment rulemaking procedures and the RFA, the small business community would have been provided with an opportunity to make their views known and perhaps a less burdensome and restrictive alternative to the bar code labeling requirement could have been found.

DOD also argues that the military function exemption under 553(a)(1) of the APA exempts their rules from RFA. Both the history of the APA and common sense dictate that Congress meant military functions in the traditional sense of the word. When procurement regulations are issued to cover purely civilian type procurements, or when both civilian and military functions would be covered by the same procedures, we believe that the RFA is applicable. Functions such as laundering, firefighting, purchase of tables, chairs and TVs, operation of day care centers and running the PX store are not traditional military functions. DOD's contention that they are military merely because they are done by the DOD runs contrary to the legislative history of the APA, which intended that exemptions in section 553(a) of the APA apply only to functions, not agencies. It is our position, based on the above, that all procurement rulemaking by DOD, since December 30, 1981 of a non-military nature, is subject to the RFA.

The Internal Revenue Service (IRS), like the DOD, has taken the position that the RFA does not apply to many of their most significant rulemakings. The APA only applies to legislative rules and not interpretive ones. The Treasury Department asserts that the great bulk of IRS regulations are interpretative in nature and, therefore, compliance with RFA is not required. For this reason, most tax regulations are not subjected to the small business analysis that RFA mandates. Since small businesses believe that tax regulations are those having the greatest impact upon them, it is indeed frustrating to the small business community that nearly all tax regulations are not scrutinized under the standards of the RFA.

Perhaps the best example of an interpretive regulation which had a severe impact on small business, but was not considered subject to RFA analysis, was the one preventing "bundling" of small issue development bonds. This regulation eliminated a crucial financing mechanism for small businesses. Other examples are proposed regulations requiring the withholding of income taxes on amounts paid under an accident or health plan (February 12, 1982) and rules providing guidance to payors and payees of annuities with respect to voluntary withholdings (May 19, 1981). Both of these result from legislative changes.

Individual Agency Interpretations

Other problems that we face when urging agencies to comply with regulatory flexibility are interpretations that individual agencies have made about the applicability of the law in certain circumstances.

First, some agencies draw distinctions between regulations with positive versus adverse impact on small businesses and fail to provide adequate regulatory flexibility analyses where the impact is perceived to be beneficial. A good example of this interpretation is the EPA. The EPA often certifies that rules do not have a significant impact on a substantial number of small entities because the impact is beneficial. There is ongoing rulemaking in which the importance of analyzing beneficial impact is apparent. The EPA, in its lead phasedown proposal of February 22, 1982, stated that there was no necessity for an initial regulatory flexibility analysis because the proposal was beneficial to small business. We thought otherwise. We contacted EPA and encouraged them to perform an initial regulatory flexibility analysis and proposed an alternative which we believed required treatment in an initial regulatory flexibility analysis. Our alternative proposed a way to tier the proposed rule to better achieve the underlying goal of the regulation, i.e., to reduce lead in the atmosphere, while still further reducing the small business regulatory burden. We have been assured informally that EPA will perform an initial regulatory flexibility analysis when the rule is reproposed. And the reproposal may include a form of the alternative Advocacy proposed in our comments to EPA. But for the RFA, and its emphasis on analyzing small business impacts, the rulemaking could have been very different.

Another problem that has been identified through Advocacy monitoring of agency compliance with the RFA is that some agencies draw distinctions for determining whether regulatory analysis is necessary between those small businesses directly affected by the regulations being analyzed and those businesses indirectly affected. Perhaps the clearest example of this problem can be seen in the context of a rule recently proposed by the Federal Home Loan Bank Board (FHLBB) concerning service corporation activities.

The proposed rule expands the activities permitted for Federal savings and loans association service corporations. This expansion would bring service corporations into competition in several fields currently populated by small businesses. For example, service corporations would be able to provide real estate brokerage and debt collection services, areas traditionally occupied by large numbers of small businesses. In its initial publication of the proposed rule, the FHLBB failed to perform an initial regulatory flexibility analysis and its explanation of the rule ignored the impact of the proposed changes on the thousands of small firms in these fields.

In response to a letter from the Office of Advocacy which informed the FHLBB of its failure to comply with RFA, the agency published a correction to the proposed rule which incorporated the initial regulatory flexibility analysis required by the RFA. We found the analysis to be inadequate in that it did not consider the impact of the proposed rule on business entities not subject to FHLBB regulation but that are significantly affected indirectly by being thrown into competition with service corporations.

In a letter informing the Office of Advocacy of the corrections and enclosing a copy of the initial regulatory flexibility analysis, the FHLBB indicated its view that neither the language of the RFA nor its legislative history required them to consider the impact of a proposed rule on entities not directly affected by the rule. It is the position of the Office of Advocacy that the language of RFA and its legislative history clearly contemplate that an agency will consider the impact of a proposed rule on entities which are not directly regulated by the agency and which are affected only indirectly when it promulgates a rule.

CONCLUSION

The Office of Advocacy has a monitoring role in RFA. Our responsibilities are to consult with agencies on how best to comply with the law and report to the Congress on agency compliance efforts. Our best weapon, however, is not our monitoring activities but rather our formal and informal involvement in rulemaking. Our work with agencies from the pre-rulemaking stages of regulation development, along with vigorous congressional oversight of agency activities, will effect the real change in regulatory policy.

Even though there has been a great deal of regulatory reform activity over the past several years, not all Federal agencies have a solid understanding of what is necessary for good rulemakings.

The RFA and the pending regulatory reform bill have the same goals. They both seek to analyze and explain articulately, the basis of regulatory actions and, more importantly, reduce onerous regulatory burdens whenever possible. These burdens can be reduced by careful scrutiny of new regulations and by a hard and critical review of the rules currently on the books. The Office of Advocacy can play its most important role by using the periodic review and agenda mandates of the RFA to insure that the overall regulatory structure reflects the concerns of the small business community. Congressional oversight of agency plans, likewise, is a most effective means of assuring that the goals set out for regulatory reform are achieved. No one can say with certainty which works in a given regulatory situation. It is my belief that most accomplishments are the result of the concerted efforts of all those concerned with regulatory reform. We must continue to work together.

APPENDIX A

PERIODIC REVIEW PLANS

AGENCY	DATE	CITE
Commodity Futures Trading Commission	6/4/81	Vol. 46, No. 107, p. 29952
Equal Employment Opportunity Commission	6/26/81	Vol. 46, No. 123, p. 33055
Department of Transportation	6/29/81	Vol. 46, No. 124, p. 33404
Securities and Exchange Commission	6/29/81	Vol. 46, No. 124, p. 33287
Department of Labor	6/30/81	Vol. 46, No. 125, p. 33536
Federal Reserve System	7/07/81	Vol. 46, No. 129, p. 35109
Federal Trade Commission	7/07/81	Vol. 46, No. 129, p. 35118
Department of Agriculture	7/08/81	Vol. 46, No. 130, p. 35279
Department of Health and Human Services	7/14/81	Vol. 46, No. 134, p. 36332
Environmental Protection Agency	7/16/81	Vol. 46, No. 136, p. 36930
Federal Deposit Insurance Corporation	7/20/81	Vol. 46, No. 138, p. 37326
Federal Communications Commission	7/31/81	Vol. 46, No. 146, p. 39183
Federal Home Loan Bank Board	8/04/81	Vol. 46, No. 149, p. 39872
Department of Education	8/05/81	Vol. 46, No. 150, p. 39882
International Development Cooperation Agency (AID)	8/14/81	Vol. 46, No. 157, p. 41229
Department of Housing and Urban Development	8/17/81	Vol. 46, No. 158, p. 41708
Small Business Administration	8/21/81	Vol. 46, No. 161, p. 42564
Office of Personnel Management	9/04/81	Vol. 46, No. 172, p. 44415
Consumer Product Safety Commission	9/14/81	Vol. 46, No. 177, p. 45621
Coast Guard (DOT)	12/07/81	Vol. 46, No. 234, p. 59685

APPENDIX A CONTINUED

AGENCY	DATE	CITE
Civil Aeronautics Board	12/31/81	Vol. 46, No. 251, p. 63320
Interstate Commerce Commission	12/31/81	Vol. 46, No. 251, p. 63358
Bureau of Alcohol, Tobacco and Firearms (Treasury Dept.)	4/14/82	Vol. 47, No. 72, p. 16033
Comptroller of Currency (Treasury Dept.)	4/14/82	Vol. 47, No. 72, p. 16033
Customs Service (Treasury Dept.)	4/14/82	Vol. 47, No. 72, p. 16033
Internal Revenue Service (Treasury Dept.)	4/14/82	Vol. 47, No. 72, p. 16033
Office of Revenue Sharing (Treasury Dept.)	4/14/82	Vol. 47, No. 72, p. 16033
Department of the Treasury	4/14/82	Vol. 47, NO. 72, p. 16033

Senator HATCH. I have a number of questions I may submit to you in writing, but let me just ask you one. Section 610 of the Regulatory Flexibility Act provides for the review of the existing reviews within 10 years. In his report on the state of small business, the President recently directed each agency to step up completion of this review of existing regulations from 10 years to 5 years.

Now, is this timetable realistic, and how is your office involved in the periodic review?

Mr. SWAIN. I think that the President's directive was motivated by the fact that—thinking back to when I was in college, if I had a month to write a paper, I would usually write it on the day before it was due. We were concerned that if agencies had 10 years to review regulations, they might wait until the ninth year to start their review. This procrastination is less likely if they have 5 years to do the reviews and if this administration, which is clearly and strongly interested in regulatory reform, plays a strong role in encouraging these agencies to start their reviews.

Senator HATCH. So you feel it can be done?

Mr. SWAIN. I think that, by and large, the agencies may not be able to review everything, but probably each agency only has a handful of regulations which have a really big impact on small business, and a 5-year timetable is certainly very plausible.

Senator LAXALT. If they operate like the Congress, we probably should impose a 5-month limitation on them, and then we could really get it done. I do not think it is unrealistic nor am I being facetious. You know as well as we do, that they are not going to address themselves to the problem until the fifth year or am I wrong in that?

Mr. SWAIN. I hope that you are wrong in that, Senator.

Senator LAXALT. Is there anything that we can do on this end to give them a bit of a nudge so that it is done in an orderly fashion? Obviously, I suppose we could require or suggest that this be phased, and we could look at it on an annual basis to see that it is progressing in an orderly fashion.

Mr. SWAIN. I think that your continuing attention to the problem not only from the standpoint of the Regulatory Flexibility Act, but also from the standpoint of S. 1080, which I certainly hope will be enacted, and the provisions of Executive Order 12291. Both of these measures call for review agendas, and there is certainly strong agreement, I am sure, within the Office of Management and Budget that the review mechanism is a very important mechanism indeed. We just have to keep reviewing it to make sure that it works.

Senator LAXALT. Well, I am absolutely convinced if we can ever extricate S. 1080 from the clutches of the House and enact it into law, that it simply would not work, at least not in the early years, unless there was aggressive oversight from the Congress. It just will not work otherwise. We are just going to have to ride herd on it, that is all, because it represents a very onerous reponsibility to the agencies downtown, many of whom disapprove philosophically with the concept. So unless we, I think, implement and supplement the thrust of S. 1080 with aggressive oversight, the types of things we hope the Act will do, just will not happen; they will be frustrated.

Mr. SWAIN. Let me make one comment, Senator, and I agree with you fully. I do believe that regulatory analysis, which is the centerpiece of S. 1080, and which was basically the centerpiece of the Regulatory Flexibility, Act, has a very important role to play. Obviously, the best regulatory reform is substantive regulatory reform. When the Congress can achieve a consensus on a substantive bill—a labor bill, an environmental bill, or a tax bill—the signals that are sent to the agencies are very clear. But the second best alternative is to force the agencies to think out loud about what they are doing as they are doing it. That is the essence of regulatory analysis.

Senator HATCH. That is all I have.

Mr. SWAIN. I would be happy to answer any questions for the record, Senator. Thank you very much.

Senator HATCH. Our next witness will be Kathleen Buck, Assistant General Counsel for the U.S. Department of Defense, who has agreed to respond to Senator Dodd's legislation on behalf of that agency.

Ms. Buck, we are very happy to have you here today.

STATEMENT OF KATHLEEN A. BUCK, ASSISTANT GENERAL COUNSEL, LEGAL COUNSEL, OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE

Ms. BUCK. Mr. Chairman, I appreciate the opportunity to appear before you to provide you with the views of the Department of Defense on S. 2170, which would amend the scope of the Regulatory Flexibility Act, greatly concerns the Department of Defense and the Armed Services.

Fundamentally, the bill would be contrary to small business interests. It is important to us to elaborate on this theme and express our concerns to the committee.

On March 4, 1982, Senator Dodd introduced S. 2170. As we read the legislation, it would enlarge the applicability of the regulatory analysis and review and other requirements of the Regulatory Flexibility Act. It would insure that even those agency rules voluntarily published for public notice and comment would be subject to regulatory analysis requirements.

Under current law, these requirements now apply only to those agency rules that are required to be published pursuant to either the Administrative Procedure Act or by some other statute. The enlargement sought by the proposed amendment of the Regulatory Flexibility Act is predicated ostensibly on protecting small business from unnecessary Government regulations.

The Department of Defense at the present time generally is not required by statute to publish its rules for comment prior to adoption as a final rule. Our regulations ordinarily fall within the military affairs exemption, agency management, or public contract exemptions from the notice and comment rulemaking requirements of the APA. This statutory exemption is based on a longstanding congressional recognition of the functional needs of the Department of Defense in fulfilling the national defense mission. Cumbersome rulemaking requirements, while necessary to the development of agency rules that are responsive to public needs, may be

inappropriate in the military context. It is at least conceivable that the delay attendant to the notice and comment cycle could diminish the commander's ability to effectuate prompt rules governing the command. The potential adverse effect this may have on the command under critical conditions is difficult to calculate.

Notwithstanding the exemption, the Department and Services voluntarily publish some rules for public comment when proposed rules would have a substantial impact on the public. Moreover, under the DOD voluntary publication for public comment program, due consideration is given to the needs and viewpoints of small business concerns and local governmental entities. The Department has long been sensitive to the peculiar position of small business in bidding and negotiating effectively and fairly on a reasonably proportionate share of DOD contracts.

The extensive requirements of the Regulatory Flexibility Act would render publication for comment by DOD components on a voluntary basis a counterproductive and inefficient approach to small business problems.

Allocation of awards within the procurement process seek a maximum return to the Government for the expenditure of fiscal revenues, together with satisfaction of mission requirements. Against this must be balanced the competing concern for the encouragement and well-being of the small business community.

We emphasize that the small business needs are a continuing concern of the Department of Defense in effectuating procurement goals. Indeed, it is pertinent to note that policy initiatives within the Department, without statutory prompting, have sought to increase the competitiveness and percentage of contracts awarded to small business concerns in the area of high technology research and development.

Further, under DOD regulations governing defense contract financing policy,[1] DOD has, as a matter of policy, sought to encourage active small business participation in enhancing small business' share of DOD contract awards. We encourage small business associations and representatives of small businesses to contact us directly and immediately if they encounter problems.

The Department of Defense is vested with neither the authority nor responsibility for discharging a regulatory role in the Federal scheme. The argument, in favor of extensive analytical requirements for DOD rules to ascertain anticipated consequences for small business, would be better advanced and considered in the process of formulating the proposed legislation for a uniform Federal acquisition system proposal developed by the Office of Federal Procurement Policy, utilizing both agency and public comment. The concerns expressed regarding small business are being addressed within the executive branch in the Office of Federal Procurement Policy. In this manner, the commercial interests of small business may be fully considered in the overall context of revising the acquisition process while avoiding an imprudent burden on the Department of Defense rulemaking.

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[1] Department of Defense Directive No. 7800.1, Defense Contract Financing Policy (Oct. 30, 1953).

S. 2170 would penalize gratuitous publication by imposing unwarranted demands for regulatory analysis and review on DOD components charged with formulating procurement policies. DOD has without exception consistently viewed congressional initiatives in regulatory reform legislation to be laudable and desirable, especially with regard to affording small business relief from unnecessary regulation. Nonetheless, an indiscriminate application of regulatory analysis requirements may be myopic insofar as it overlooks the impact on the defense mission.

The opportunity to present the views of the Department is greatly appreciated. We urge you to consider the relative merits of S. 2170 with due regard for possible adverse effects on the Department and the Armed Services.

Based on the testimony of others today, I would like to make some additional comments. With respect to the remarks presented by Senator Dodd, we certainly agree with Senator Dodd regarding the importance of focusing on the problems that small business has encountered, and in fact, the Department has a Small Business Office that deals specifically with these problems.

Senator LAXALT. Within the framework of DOD?

Ms. BUCK. Yes, sir. And that office, in fact, reports directly to the Deputy Secretary of Defense.

Also, as Senator Dodd stated, we have a voluntary program. I think that his concern rests primarily in the possibility that we might stop this voluntary program, and I would like to state for the record that we have no intention of stopping our voluntary program. In fact, we are constantly looking at ways that we can improve that program. And, as I stated earlier in my testimony, we would certainly encourage any representatives of small business to come in to the Pentagon and talk to us about ways in which we can encourage small business, in the procurement area.

Thank you.

Senator HATCH. Do you have questions, Senator Laxalt.

Senator LAXALT. Just a question or two, if I might. Thank you very much for your testimony.

I do not think it is the intention of this subcommittee or any subcommittee or the Congress as a whole, to frustrate the mission requirements of DOD. I wonder whether there is not some kind of middle ground here where we can perform a better service for small business generally without frustrating DOD's objectives.

I know that most recently, when we were working on an extensive proposed MX mission requirement for our respective States of Utah and Nevada, your people were most helpful on a voluntary basis in holding briefing session after briefing session with small business people who were interested in bidding for the work. I thought that worked exceedingly well. And I just wonder, as a general matter, when you are talking about States like Connecticut—I frankly did not realize the enormous impact, apparently, that DOD has within the framework of that State—if there is not some kind of middle ground where we can achieve essentially the objective of regulatory flexibility as defined by the Act, and still not frustrate you.

Ms. BUCK. I might add also that not only do we voluntarily publish, but we actually have a list of associations that we send propos-

als out to, and it just so happens that the New England Small Manufacturers' Association is one of the associations on our list, and I see that they are going to make a presentation here.

Senator LAXALT. Is it your contention here that on a voluntary basis, there is little need for modification and legislation because overall, things are preceeding fairly well.

Ms. BUCK. Yes, sir, that is our contention. It goes along with the old saying, "If it ain't broke, don't fix it." And to the extent we do have any problems, we have not been contacted by any small businesses or small business associations to indicate that there are problems. If there are any problems we would be delighted to hear from those people, and hopefully, to correct any problems that exist.

Senator LAXALT. I thank you.

That is all I have, Mr. Chairman.

Senator HATCH. Thank you, Senator Laxalt.

A lot of small business owners have complained to us around here that they are often disinclined to do business with the Defense Department due to the regulatory redtape involved with DOD contracts. Now, you have indicated to a degree what the Department is doing to cut down on the redtape, since it does not really comply with Reg-Flex.

Could you explain to the subcommittee how procurement regulations impact on military security?

Ms. BUCK. I am not sure I know exactly what you mean by how they would impact on military security.

Senator LAXALT. Do you mean procurement as distinguished from R&D?

Senator HATCH. Yes.

Ms. BUCK. Well, there are some security problems with respect to various procurement. The procurement regulations establish the procedures and rules under which we buy all of our needs. Any unnecessary complications or delays that are built into statutory requirements affecting these procedures and rules have a direct and immediate impact on our ability to fully carry out our defense mission. Further, there are times when it is necessary to change our procedures or rules to accommodate an urgent, and perhaps unforeseen, situation, and such restrictions as those imposed by this Act could negate such flexibility and seriously handicap our ability to respond to urgent situations.

Senator HATCH. I suppose.

Ms. BUCK. Certainly, any facility that is used in the manufacturing of various defense items, those may be under classified contracts, and in that case, we do have to have a facility clearance, and the individuals involved with that procurement would also bave to be cleared.

Senator HATCH. Well, without regard to those that are directly related to security problems, is there any way we could cut down on procurement regulations so that it would make it easier for small business to really work with the Department of Defense?

Ms. BUCK. We are as much opposed to redtape as small businesses are, for we are equally affected by any paperwork required. Therefore, our Deputy Secretary of Defense, Mr. Carlucci, established a series of initiatives to streamline and improve our procure-

ment procedures, and the implementation of these is currently underway. These will benefit both small and large businesses as well as our procurement officials. With the ceiling on use of small purchase procedures raised to $25,000, the use of simplified procedures can now be greatly expanded. Small businesses are the primary beneficiaries of this action, since by law such purchases are reserved for small businesses where adequate competition exists. I should note that small purchase procedures involve obtaining an oral quotation, and issuing a purchase order based on that quotation.

We believe that many small firms make an assumption about the amount of regulatory redtape associated with our contracts that is not valid. Last year—fiscal year 1981—DOD awarded contracts to small firms totaling $17.8 billion, or 20.4 percent of our total awards to business firms. If the amount of redtape was prohibitive, our awards could never approach that level. We have found that such false assumptions stem mainly from a lack of knowledge of how our procurement system works, and of the ready availability of assistance to small firms within that system. For example, at each and every one of our buying activities, we have at least one person specifically designated to assist small firms in any procurement-related problem they may be having with the activity, and to provide guidance and counsel to small firms on any aspect of DOD procurement procedures. At our larger activities, we often have three full-time personnel assigned to this function. We publish a directory of these personnel, and it is available upon request from any of our buying activities. Our regulations identify 26 specific duties for these personnel, all concerned with assisting a small firm in participating in our contract competitions.

I think it is always important for us to have a line of communication there to make sure that we do not do something that would preclude small business from participating in the bidding process. I am not sure that that is possible in every case. In fact, it probably is not. But we have implemented some new programs specifically to combat that. One of them is a new program regarding spare parts, and pursuant to that program, what we would be able to do is to break off from the prime contract, the contracts for small parts, to try to involve the small businesses to the extent we possibly could. And as far as I know, we are able to do that in many cases and overcome any security problems. And I think it is important that we continue along that line.

Senator HATCH. What actual burden, if any, would Reg-Flex have on internal rulemaking processes at DOD? Would it really be a burden?

Ms. BUCK. Well, sir, although I have not worked in the Pentagon for a long time, I think that the Department of Defense is capable of doing almost anything, given the right amount of money.

Senator LAXALT. A little short of money, are you?

Ms. BUCK. Well, I have heard claims that we are short of money. [Laughter.]

Ms. BUCK. I think that certainly, we are capable of doing all kinds of analyses, and we regularly do that. But I think that we should just do that as an automatic step, take a look at our regulations and include small business associations whenever we are de-

veloping regulations and it does look like we might be able to have small business bidding. We should just go ahead and do that. And I am not so sure that a formal analysis in each case would be necessary. But we are not contending that it would be impossible for us to do that; no.

Senator LAXALT. Would the Senator yield on that point for a moment, and perhaps we should have asked Mr. Swain.

Is there an active liaison between your office and DOD and the small business shop?

Ms. BUCK. Yes, sir, there is.

Senator LAXALT. There is. Is that going reasonably well?

Ms. BUCK. As far as I know, it is. And in fact, we also send over the Small Business Association proposals so that they can disseminate those proposals to the list of people that they have.

Senator LAXALT. I guess the record should indicate Mr. Swain is nodding approvingly, as well, and apparently concurs with your characterizations, Ms. Buck.

Senator HATCH. Thank you so much for your testimony.

Senator LAXALT. Thank you. We appreciate it.

Ms. BUCK. Thank you.

Senator HATCH. We have asked the following individuals to testify on behalf of several national small business associations as part of a panel. We would like to invite them to the witness table at this time.

First, we will hear from Mr. Shaw Mudge, representing the Smaller Business Association of New England; Mr. Jere Glover, who is representing the Small Business Legislative Counsel; Mr. Mike Roush, with the National Federation of Independent Business; and Mr. Chuck Ackerlow, who is testifying on behalf of David Tomlinson, president of the Utah Council of Small Businesses, representing Small Business United. Because of personal circumstances, Dave was unable to be with us today.

We would like to ask each of you gentlemen to please summarize your comments, if possible, and to please limit your time to 5 minutes each. We would appreciate the extra time to ask some questions.

We will start with you, first, Mr. Mudge, and then we will go to Mr. Glover, Mr. Roush, and finally, my good friend from Utah, Chuck Ackerlow.

STATEMENTS OF A PANEL, INCLUDING: SHAW MUDGE, PRESIDENT, SHAW MUDGE & CO., ON BEHALF OF THE SMALLER BUSINESS ASSOCIATION OF NEW ENGLAND; JERE GLOVER, REPRESENTING THE SMALL BUSINESS LEGISLATIVE COUNCIL; MIKE ROUSH, LEGISLATIVE REPRESENTATIVE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS; AND CHUCK ACKERLOW, REPRESENTING SMALL BUSINESS UNITED

Mr. MUDGE. Thank you very much, Senator Hatch.

My name is Shaw Mudge, and I am president of a small small fragrance firm and also a small chemical manufacturing firm located in Stamford, Conn.

I would like to respond to Senator Dodd's comments with some personal comments. It has not been difficult to energize either of

Connecticut's Senators to the concern of New England's independent and smaller businesses. As the director for Connecticut to the Board of SBANE, the Nation's oldest regional small business association, I can say that we are very pleased to have the regular participation in our small business breakfasts, with our small business task forces, and are very pleased to see that they have assigned members of their staffs to small business concerns.

Thank you for inviting me, a small businessman, to testify before this committee. Because I believe I am here to represent SBANE and the small business grassroots movement in America, as well as the concerns of Shaw Mudge & Co., we contacted 26 presidents of small businesses since receiving your invitation. Men and women were contacted in different industries from Florida, North Dakota, Illinois, West Virginia, New York, New Jersey, and Alabama. These people are friends of mine, so they in turn each contacted two or three more people. One woman called her network of 20 businesswomen.

As of last week, no one had yet seen a direct effect of the Reg-Flex Act on their businesses. On the other hand, one or two said they have not been "hit over the head" recently with new Federal regulations. Some even commented on how nice it has become dealing with the Government. The expression, "I am from the Government, and I am here to help," is beginning to have some truth to it.

My personal businesses also have not yet seen the effects of Reg-Flex, but two sets of pending regulations, one from OSHA and the other from the FDA, have included Reg-Flex in their considerations. Both of these regulations could strongly affect my chemical and fragrance firms.

The first is OSHA's "hazard communication" reintroduced March 19 of this year:

> The proposed standard requires chemical manufacturers to assess the hazards of chemicals they produce and to provide information to their employees about these hazards * * * including access to written records.

My entire industry applauds the objectives, with certain modifications, of OSHA in their proposed rulemaking. We want uniform national regulations so we do not have to work with 52 different sets of regulations, each State demanding another variation and further threatening our trade secrets.

OSHA heeded the concerns of our industry and recognized the greater time needed by small businesses to comply with the regulations. OSHA implemented Reg-Flex and adjusted the compliance periods for large, medium, and small companies.

These time periods are still to be firmly determined, but OSHA did consider a small company like mine. Believe me, we are small. Our sales are under $10 million, and we employ less than 40 people. Shaw Mudge & Co., uses a combination of 2,500 pure chemical substances, complex natural substances, and mixtures. The fragrance industry is very clean. We do not use hazardous chemicals. Notwithstanding, who would assess the hazards of these 2,500 solutions and mixtures used by my firms?

We employ one research chemist with his assistant and one director of analytical services and his assistant. These people are

part of our everyday research and production. We are not a large corporation with a salaried department to work on determining hazards of chemicals. Besides, many of these large corporations who are our customers will depend on us, their small business suppliers, to confirm the safety of our chemicals and mixtures. We need time to supply information for the large corporations and additional time to assess the chemicals and mixtures of medium and small firms.

We at Shaw Mudge & Co., compliment OSHA on its attempt to enforce Reg-Flex. Keep up the good work.

While OSHA will be utilizing the size differential aspect of Reg-Flex, FDA will be impacting upon my company by using Reg-Flex's review of existing regulations rule.

In September 1980, FDA passed a regulation that all manufacturers of bubble bath must place a health hazard warning on each package. Shaw Mudge & Co., innovates fragrances for bubble bath products. This regulation, which would have threatened the survival of an entire segment of the industry, was to go into effect in early summer 1981. In June 1981, FDA issued a press release staying the regulation.

The cosmetic industry would like the regulation reexamined for a permanent decision. FDA said in the July 2 Federal Register that the regulation governing bubble bath label warnings is among its top priorities for review under the Regulatory Flexibility Act. Thank you, FDA, for enforcing Reg-Flex.

In concluding my testimony on Reg-Flex, I would like to discuss one piece of pending legislation that has not reached its regulatory agency. That is the Tax Equity and Fiscal Responsibility Act of 1982. While this act is still in conference between the Senate and the House, Senators and Congressmen should impose Reg-Flex on its enforcement. Then, along with S. 2170, the 1982 tax bill would direct IRS to perform economic impact studies on their regulations.

Let me give one example of the 1982 tax bill that will add needless paperwork and expense to small business. Like most small businesses, the accountant who prepares my business tax forms also prepares my individual tax forms, my wife's and our sons' tax forms. If the business pays me or my wife or my sons—the major principals in the company—a dividend, the next tax law says the business must file withholding statements by a certain date for certain threshholds. How needless for small business. Any dividend would only be paid near the end of the fiscal year when individual taxes are due. My accountant would just duplicate his tax work and my expenses when he prepares our tax returns.

Here is an example of legislation that would make an IRS rulemaking needless for small businesses because it would not improve the Government's cash flow. But on the other hand, the legislation would be significant for large commercial firms in helping the Government's money situation.

Thank you for allowing me to testify before your committee today. We urge your support of S. 2170.

Senator HATCH. Thank you very much, Mr. Mudge.

Next, we will hear from Mr. Jere Glover, representing the Small Business Legislative Council.

STATEMENT OF JERE GLOVER

Mr. GLOVER. Thank you, Senator.

I am appearing today on behalf of the Small Business Legislative Council, which is comprised of 70 trade associations, representing over 4.5 million small businesses.

As Deputy Chief Counsel for Advocacy for Interagency Activities, I had the honor with working with the past Congress closely during the debates and passage of the Regulatory Flexibility Act. The Small Business Legislative Council was active and instrumental in securing passage of the Regulatory Flexibility Act.

The Regulatory Flexibility Act and its companion bill, the Equal Access to Justice Act, were designed to change the way that the Government and the Congress approach small business. All too often in the past, the Government has ignored the distinctions between large and small businesses.

In the area of enforcement, small businesses have often been targeted for test cases and as easy compliance marks. Enforcement officials knew that small businesses did not have the resources, in most cases, to fight agency actions.

Equal access was an attempt to change the enforcement attitude of Government officials. By requiring the Government to pay for legal actions it loses, which were not substantially justified, Congress was attempting to change the behavior of Government officials. Likewise, the Regulatory Flexibility Act was designed to significantly change the behavior in the area of regulations.

By passing the Regulatory Flexibility Act, Congress established the principle that small businesses are unique and different. No longer would Government agencies be permitted to pass rules and regulations without first having analyzed their effects on small business and considering less burdensome alternatives.

Given the lofty goals and objectives of the Regulatory Flexibility Act, one must ask, "Have they been effective?" Generally speaking, they have been. In many instances, we have seen agencies taking into consideration small business. They are consulting with small businesses. As a general rule, that had not happened. By and large, the Office of Advocacy as SBA has been doing an effective job of monitoring and reviewing Government proposals as they come out. Recent improvements in SBA's data base will make that job easier.

President Reagan, in his first annual report on the state of small business, has directed agencies to accelerate their activities. By raising the compliance visibility at the Presidential level, the Regulatory Flexibility Act, this administration has indicated strong support. Generally things appear to be working well. Unfortunately, we will not know for several years what the Government has really done to us. I will have to reserve judgment until we have more experience, before making a final judgment.

There are some very clear problems. And one of those is, as an example, the Federal Aviation Administration, in its recent regulations on procurements, attempting to impose regulations which would have restricted small businesses or excluded them. By so doing, these regulations would work directly against small business. Through the interactive intervention of the Office of Advocacy at SBA, the Department of Justice, and two congressional over-

sight hearings, this problem has now been brought to the public attention. We would hope that the FAA will withdraw those regulations, or certainly, modify them.

We are always concerned as to whether public safety was the motivation for an agency action. In this case, clearly, it was not. They stated safety was not the factor.

Any time there are significant economic advantages to a particular firm, there is a possibility that the Government will impose regulations that are unnecessary. The Regulatory Flexibility Act provides a procedure to make sure that does not happen. The FAA, in this particular instance, certified that it would not have any significant impact on small businesses. I think we have seen the law work as it was designed.

But before getting to the issue of judicial review, let me mention two other areas of possible concern. One is the Department of Defense and its attitude and interpretations that they are not required to comply with the Regulatory Flexibility Act. One must question in a situation where you have the current President and the past President, unanimous action by a number of congressional committees, and unanimous action by both houses, that something is important and necessary. Why any agency would choose to interpret the law as narrowly as they can to exclude themselves from it. We would hope that the agencies would, regardless of the legal technicalities, proceed on, and comply with the spirit and the intent of what Congress was saying, rather than rely on some technical arguments to avoid compliance.

The Internal Revenue Service, I think, is a much more blatant kind of situation. The last Congress passed several regulatory reform bills. One was Equal Access to Justice Act. Another was the Regulatory Flexibility Act, and another one was the Paperwork Reduction Act. I think it is ironic that in less than 2 years, the Internal Revenue Service has asked Congress to exempt or modify each of these laws to exempt the IRS. The IRS has proposed legislation to remove it from the Paperwork Reduction Act. The IRS produced 50 percent of the Federal paperwork burden on all small businesses. On the Equal Access to Justice Act, the IRS has proposed an amendment to modify the standard under which they would be found to have acted improperly. In the area of the Regulatory Flexibility Act, thev are defining their rules as "interpretive" as opposed to regulatory. This argument, while I do not want to go into it in detail at this time, is somewhat ironic. When IRS goes into the court, they argue that these rules should be given great substantive weight. When it comes time to propose those rules and comply with the congressional mandate, "Oh, no, these are just interpretive only." Well, I think the IRS cannot have it both ways. And I think we see in this situation that the rules are very significant and do have a significant impact.

I think for this reason, S. 2170 is important, and I think that we should see those amendments enacted into law.

Let me turn to the area of judicial review. Judicial review is a difficult and complicated area. As you may remember during the last Congress, there was significant discussion about the issue of regulatory reform and exactly how Congress would handle that particular issue. Recently, in the *Thompson* v. *Watt* case, a Federal

district court has ruled that there is no judicial review of any agency determination under the Regulatory Flexibility Act. I think that the attempt by the Congress to prevent an EPA environmental impact kind of situation where all regulations are reviewed by the courts, while still allowing judicial review in some cases.

The Office of Advocacy was given the right to file amicus briefs in some cases. This is unique in the American legal system so far as I know. No other Government agency has an absolute right to intervene in any court on behalf of a recognized group, in this case, small business.

There is a rule in administrative law that generally speaking, agencies' decisions are entitled to great weight, and the court presumes that the agency acted properly. By allowing the Office of Advocacy to intervene, you then have a conflict between two Government agencies. At that point, the presumption that the agency is acting properly is rebutted somewhat, and the court is then able to decide how it wants to rule in that case. It can then rule based on what is fair and how the law should be and how it should be interpreted.

This balancing, by allowing the Office of Advocacy to intervene, helps increase the judicial review aspect. One of the things that I think is troubling about the *Thompson* v. *Watt* case is that we see one Government agency there versus small business. The Regulatory Flexibility Act is very much a part of that case, and I understand it is still under consideration with the Office of Advocacy as to whether they will file an amicus brief in that case. But I think it is important that that balance be there, because without that, you have a court that has ruled that there is no judicial review. I think the law is clearly that there is judicial review. In many cases under the constitutional law and under the administrative law, we have found that even when Congress has specifically said there will be no judicial review, the courts still review the agencies determination.

In conclusion, we see that the Regulatory Flexibility Act has been properly implemented. It is meeting its goals and objectives set out by Congress. We are concerned with some agencies' attempts to eliminate themselves from the act. And I think that we have to be concerned about the judicial review aspects, because in the event that the courts rule that there is no judicial review, ultimately, I think that the Congress will have to immediately modify the law in order to make sure that there is judicial review.

Senator HATCH. Thank you.

Mr. Roush?

STATEMENT OF MIKE ROUSH

Mr. ROUSH. Thank you, Mr. Chairman.

My name is Mike Roush. I am from the National Federation of Independent Business.

In order to save time and not to repeat testimony that has been given, I will be extremely brief and basically, just state conclusions rather than lines of reasoning.

Senator HATCH. That will be fine.

Mr. ROUSH. NFIB feels that the Regulatory Flexibility Act has begun to work. It has not yet fulfilled all of our expectations or anybody else's. It has not had time. But it has begun, and we are pleased with the beginnings that have been made.

The act as it stands now, the act as it was passed, we believe, needs a strong coalition of outside forces to make it successful. It has currently got that outside coalition of forces, and we hope that such a coalition stays together—namely, a strong commitment from the President for implementing and making effective the act; diligent oversight by the committees of jurisdiction; vigorous exercise of the authority granted under the act to the chief counsel of advocasy at the SBA, and a good working relationship between the Government and representatives of the small business community.

As far as S. 2170, Senator Dodd's proposal to change the language so that IRS and DOD would be included under the act, we think that the act does need to be changed in that regard so that the ambiguity that is there will be taken care of.

I would be glad to answer any questions that you might have.

Senator HATCH. Well, thank you so much.

I am really glad to have my good friend from Utah, Chuck Ackerlow, here, representing Mr. Tomlinson. Chuck, go ahead.

STATEMENT OF CHUCK ACKERLOW

Mr. ACKERLOW. Thank you, Mr. Chairman.

My name is Charles Ackerlow. I am a member of the Council of Small Business of the U.S. Chamber of Commerce. Today, I am testifying on behalf of Mr. David Tomlinson, of the Utah Small Business Council, and also of Small Business United, which is a national small business organization composed of some 19 regional, State, and metropolitan trade associations.

I have attempted to merge together both the testimony of Mr. Tomlinson, plus some additional information from the Council of Small Business of the U.S. Chamber of Commerce, which I think might be appropriate for your committee, Mr. Chairman, and again, rather than reading it, I would like to just highlight a couple of points, since most of what we would say in this particular written testimony has already been covered by the other panelists at the table.

Basically, the thrust of our testimony with regard to Reg-Flex is that it is——

Senator HATCH. Let me interrupt for just one second, Mr. Ackerlow.

We will put all statements that have not been read in the record as though they were fully delivered, without objection, so that we will build the record that way. But we do appreciate the way you all have been summarizing.

Go ahead.

Mr. ACKERLOW. Thank you.

The view of Reg-Flex is that its effectiveness in its initial stages of implementation has been essentially good. We would agree with what has been said here already, that the jury is out in certain aspects of it and with reference to certain agencies. We also would agree with what again has been said here this morning, that cer-

tain agencies have been less rigorous than others in their implementation of the requirements under Reg-Flex.

Recently, the Council of Small Business of the U.S. Chamber—and when I say recently, last week—we sent out a survey to our membership to determine what the regulatory climate is among our membership and also get some feedback as to what their thinking was with regard to how Reg-Flex has impacted on their businesses. We have just begun to receive our responses and collected those responses last night to assemble them for you so that you might have this information here today.

We have had somewhere near 300 responses thus far, and that by no means is all that will come in. We generally get thousands of responses on these surveys. But I would like to share with you the preliminary results from small business owners.

Basically, those who responded to our survey felt that regulatory burdens in their small businesses on balance have increased during the last 2 years. They feel that the administration by far has done more than the Congress has done or the court have done to reduce regulatory burdens. They feel that the IRS regulations are a serious burden to almost twice as many small business owners as are the regulations of any other agency. And the IRS came in for a heavy thumping in the survey thus far.

OSHA is the only agency that any substantial number of small business owners feel is doing something to reduce regulatory burdens. Regulations of each agency covered by the survey are beneficial to at least a small number of small businesses from 5 to 10 percent. I will submit to you the full survey and its results in our written testimony.

With reference to Senator Dodd's bill, both Small Business United and the Council of Small Business of the U.S. Chamber supports Senator Dodd's bill. Based upon the testimony we have heard here this morning, obviously, there are some areas with reference to DOD that need to be examined before DOD is completely blanketed under Reg-Flex.

We do not, however, see any reason why the IRS cannot be blanketed under Reg-Flex and not be required to comply, since it is the view of both of our organizations that it was the intention of the Regulatory Flexibility Act to cover them in the first place.

Mr. Chairman, as I mentioned, I will submit all of this to you in writing and in detail, but in summary we would say to you that we think the Regulatory Flexibility Act is a good start, a step in the right direction; it seems to be working well, and on balance we would support S. 2170.

Senator HATCH. That is great.

We appreciate the testimony of all four of you. I have a number of questions that I would like to submit in writing to you, and you can answer them at your leisure, although we would like to have the answers back as quickly as possible. We are building a record on this matter, and I think that the testimony that we have received thus far in this hearing will be very helpful to Senator Laxalt, Senator Leahy, and of course, to me, in our future considerations of how we might be able to help you as small business leaders and small business people throughout this country. So we really

appreciate the effort you have put forth in being here; we appreciate it.

Thank you so much for being here.

[Responses by Mike Roush to written questions from Senators Laxalt and Hatch follows:]

RESPONSES OF MIKE ROUSH TO WRITTEN QUESTIONS FROM SENATOR PAUL LAXALT AND SENATOR ORRIN G. HATCH

Question No. 1. You mention the Regulatory Flexibility Act's provision concerning review of existing regulations in your statement. Is NFIB involved in this process at all?

Answer. NFIB's involvement in agency review of existing regulations has taken three forms. One, we have on several occasions submitted formal comments to particular agencies in response to requests for comments on revisions of specific rules. We have also submitted suggestions, either directly or through Frank Swain, SBA's Chief Counsel for Advocacy, to the Vice President's Task Force on Regulatory Relief as to a number of existing rules which should be reviewed and revised. Finally, we have informal discussions with several agency officials—notably the agencies within DOL and the Treasury—on an ongoing basis, during which we are asked to provide advice or suggestions on specific rules which should be reviewed. We intend to continue this activity, and make a special effort to comment on as much of the recently published IRS five-year review plan as possible.

Question No. 2. You mention several cases where the Regulatory Flexibility Act has benefited small firms this year. Are you aware of any cases where the Act was ignored, or only partially complied with by Federal agencies in a recent rulemaking?

Answer. Given somewhat limited resources, NFIB must concentrate its oversight or regulatory flexibility to a select few agencies within the government which impact especially hard on small business. The most notable is, of course, IRS, and the record is clear on its refusal to comply with the Act. Procurement regulations, particularly as they relate to DOD, are another notable area of exception. Beyond this, the FAA is the only agency we are familar with that has recently ignored the reg flex procedures in issuing a major rule.

Question No. 3. In your opinion, is the Regulatory Flexibility Act fulfilling its objectives?

Answer. Inasmuch as the Act has been in effect for a relatively short time, we believe it is already having an impact on rulemaking procedures. As we noted in our testimony, some agencies had become sensitized to small business needs and concerns prior to the Act's implementation. For these agencies, it has been a relatively easy transition from having no statutory requirement to conduct a reg flex analysis to including such analyses as part of normal rulemaking procedures. Much remains to be done, however, particularly in the outreach area. Agencies are still reluctant to find other means in addition to publication in the Federal Register to notify small business of proposed rules or revisions of existing rules. Plans for review of existing regulations have not been developed as quickly as we might have liked. We believe it is fair to say that the transition period for the agencies is now over, and the next six months to a year will be the time for Congress and the small business community to pay even closer attention to agency actions regarding reg flex. Finally, we reiterate the central point we tried to make in our testimony—for regulatory flexibility to be truly effective, it is essential that both IRS and DOD be required to comply fully with the Act.

There is another danger as well, that being Congress' taking the initiative to destroy its own handiwork. I refer to attempts within both Houses of Congress to enact legislation containing statutory exemptions from the time limitations and procedures of the Regulatory Flexibility Act, the Paperwork Reduction Act, and Executive Order 12291.

The Marine Mammal Protection Act, containing such an exemption, was enacted last year. Currently S. 2450, the Magnuson Fishery Conservation and Management Act Amendments, has been reported out of committee and awaits floor action. Both S. 2450 and its companion House bill, H.R. 5002, contain the above-mentioned exemption. NFIB is deeply concerned about, and will steadfastly oppose, these efforts to chip away at the entire regulatory and paperwork review structure.

Two items of importance in better implementing the Act have already been mentioned, i.e. outreach and review of existing rules. Equally, if not ultimately more, important is the issue of judicial review and the role of the Chief Counsel in the judicial review process.

Question No. 4. Do you have any additional suggestions that could lead to improved implementation of the Act?

Answer. We believe it critical that the Office of Advocacy within SBA adopt a more aggressive approach in fulfilling the responsibilities vested in the Chief Counsel by the Act. Without commenting on the merits of the case of *Thompson* v. *Watt*, et al, NFIB firmly believes that Section 611 of the Act clearly provides for judicial review of final agency determinations, and that agency compliance with the Regulatory Flexibility Act is to be considered an integral part of such a review. Further, Congress clearly intended that the Chief Counsel play a pivotal role in the judicial review process. To our knowledge, Section 612(c) represents the only provision of law in which Congress directs the courts to accept an appearance by a particular person. The Chief Counsel's role in the judicial review process substantially changes the traditional bias of the Court towards a government agency. The intervention of the Chief Council effectively neutralizes the agency's position vis-a-vis the individual plaintiff, so that both sides' positions are given equal weight from the outset. The threat of judicial review was intended to be a powerful incentive to agencies to comply with the Act, and the unique role the Chief Counsel can play in the process might well determine whether Congress' intention will come to fruition or to naught.

Senator HATCH. Our last panel includes Paul Verkuil, dean of the Tulane University School of Law. Mr. Verkuil has done extensive research on the judicial review section of the Regulatory Flexibility Act. In fact, he has recently completed a paper on this topic, which will soon be printed in Duke University's Law Review.

Mr. Verkuil, I understand you will be submitting your law review article for the record as we continue here.

In addition, Charles E. Bangert, who is also a friend, has also agreed to testify regarding the judicial review issues of this law. Mr. Bangert is currently representing a client in a suit against a Federal agency which allegedly did not comply with the requirements of the Regulatory Flexibility Act. For obvious reasons, we have asked Mr. Bangert to limit his comments to the general litigation problems associated with the statute and refrain from any specific mention of his case, which is currently pending in court. Mr. Price is accompanying Mr. Bangert.

We are grateful to have you gentlemen with us here today.

We will start with you, Dean Verkuil, and then we will go to you, Mr. Bangert.

STATEMENT OF A PANEL, INCLUDING: PAUL R. VERKUIL, DEAN, SCHOOL OF LAW, TULANE UNIVERSITY; AND CHARLES BANGERT, ATTORNEY-AT-LAW, RANDALL, BANGERT & PRICE, WASHINGTON, D.C., ACCOMPANIED BY CHARLES A. PRICE, PARTNER

Mr. VERKUIL. Thank you, Senator Hatch.

I have submitted my testimony to you, and I think what I will do is just comment upon two aspects of the hearing today. One is S. 2170, and the second is the problem of the judicial review provisions of the RFA.

In my view, S. 2170 is a helpful and positive amendment to the act in that it clarifies an important question of coverage of the act, with respect to those agencies which we have already heard from today as being one of the most pivotal where the act is concerned,

namely, DOD and IRS, and it extends coverage without really creating any adverse consequences.

The advantage of S. 2170 is that it imposes upon agencies that already voluntarily engage in notice and comment rulemaking an additional step of considering small business concerns. It does not create any new responsibilities in a grand sense, and it still provides the agencies with the opportunity, if necessary, to avoid responsibilities by tailoring their notice and comment procedures where they are voluntarily stated.

Something that Senator Dodd mentioned was what could be the negative impact of this—even though it is all conceded that getting more small business analysis into a regulation is a good thing, and I think most agencies would say, "This is what we want to do. We want to learn what these small business concerns are, and we want to see if we are unintentionally impacting upon them during the rulemaking process."

The fear, of course, is that somehow, if this additional responsibility is added, the agencies who voluntarily engage in notice and comment rulemaking will simply back out of it, will simply give it up. I really think that fear is overstated. Frankly, after listening to the DOD representative here this morning, I am confident of that fact, because she says that they already do virtually what the RFA requires, and they are sensitive to small business concerns, et cetera, and really, that is basically what the RFA asks: That you consider problems as they reflect upon the special needs of small business, and if that is already being done in the main, it does not strike one as a great additional burden to structure that simply in a written form as part of the rulemaking process.

So therefore, I do not see a great danger of backing away from voluntary rulemaking, although one must consider that in the process of amendment.

In addition, however, you cannot really read S. 2170 in isolation. You must read it in connection with S. 1080, the regulator reform bill. Now, the regulatory reform bill cuts back on the military affairs exemption, and it limits it, really, to those concerns for military security, which is what I think some of the questions posed to the DOD representative reflected. If there is, in fact, a true military security problem, surely, there should not be publication of the rules and related matters. Most of the procurement rules do not raise that issue, and that was recognized in S. 1080. If S. 1080 becomes law, indeed, part of this whole problem we are dealing with will go away, because the APA itself will be expanded to cover the DOD.

Similarly with IRS, the interpretive rule exemption, which has been used, many feel, as a way for IRS to avoid publication and in many cases, also, to avoid dealing with problems of small business. S. 1080 proposes to narrow the interpretive rule exemption of the APA by looking at the substantive impact of a rule, whether it is denominated interpretive or not, and by so doing, many IRS rules which are now out from under the notice and comment requirements will find themselves back within them.

So I think if S. 1080 goes forward, S. 2170 indeed will be very complementary and will not do anything dramatic to expand responsibilities of agencies already under the RFA today.

One concern—and this really blends into the judicial review provision—I think the agencies might have is, if they voluntarily assume notice and comment responsibilities and if we then add on, through S. 2170, the RFA responsibilities, will the judicial review provisions be such that they will find themselves having their rules knocked down on that basis because they have suddenly started to talk about the small business concerns.

Here, I guess I come out on the side that really, judicial review is not a major aspect of the RFA. It is not intended to be, under section 611, it is extremely narrow and indeed nonexistent in many cases.

In *Thompson* v. *Watt,* which is an opinion I must confess I have not seen but have only heard about, so I will just speak to it very gingerly, Judge Green apparently said that the fact that the Department of the Interior certified that one of its rules would not have a significant impact upon small business, et cetera, was not subject to judicial review. It seems to me that part of the opinion is entirely consistent with the act because 611(a) contemplates no judicial review of certifications. Now, all we have in terms of judicial review is 611(b), which does talk about making the regulatory flexibility analysis part of the whole record. This is really the only basis for assuming that there is some judicial oversight contemplated. That is a very narrow provision. It does not say what you do with it; it just says that it is part of the whole record. Well, if that had not said anything, that would probably be true. In all likelihood, any rule that goes up would have anything connected with it attached to the whole record. That would be traditional law. The fact that the RFA says so does not really expand review in any sense.

It does provide for an amicus participation by the chief counsel for advocacy, and I think that is a significant thing. It expects that on review, the advocacy role of small business will be presented, and in effect, it allows argument on the question of whether or not the final regulatory flexibility analysis is properly prepared.

But I think that argument must be very narrow, for example, it would be narrower than an argument with respect to the regulatory analysis requirements of S. 1080. In S. 1080, the judicial review provision reads for the first part much like the RFA provision. It reads, in fact, the same until it adds a clause at the end which increases judicial review. The clause which is added to S. 1080 in section 623 is that the regulatory analysis "shall be considered by a court in determining the legality of a rule." That language is not present in the RFA 611, which suggests to me, at least, that the legality of the rule factor in reviewing the final regulatory flexibility analysis is not present.

Now, what is going to happen as a practical matter if a court is faced with what we might call a very shabby or even nonexistent regulatory flexibility analysis where there.was no certification? I think it is fair to say that a poorly done regulatory flexibility analysis will taint the rulemaking record as it appears to a court on review. Judge McGowan, who I think is preeminent in the field of analyzing the role of the courts on review has suggested in other judicial and nonjudicial statements that perhaps the presence of a very poorly done regulatory flexibility analysis would make the court look askance at the rule itself and might affect the question

of whether or not a rule is arbitrary and capricious. But that is a hard thing to measure, and I expect that that will not come up except in a very few, extreme, cases with respect to compliance under the RFA. In the usual kind of case, judicial review will not be functionally available.

Now, I do not take this as a bad thing. No. 1, if it is not generally available, it may encourage those agencies which have the opportunity to use RFA analysis to do so because they are not so afraid of being struck down for failure to cross the t's and dot the i's, which is one of the concerns one generally has about subjecting rules to voluntary notice and comment. In that connection, Health and Human Services is rethinking its voluntary rulemaking procedures which were established in 1970 in a rulemaking notice that I have noted in my comments. But the reason they are rethinking it is not because of the RFA requirements which might be superimposed, but because they feel that the courts have added burdens to them as a result of voluntarily assuming rulemaking responsibilities that really went beyond what they had intended to assume in 1970, when they voluntarily waived their opportunity under the APA to ignore notice and comment rulemaking. And if the Regulatory Flexibility Act is not read to impose onerous judicial review oversight, it will, as a practical matter, encourage agencies to engage in it more broadly.

Well, where does that leave us? Do we still have an opportunity for oversight, do we still have an opportunity for control? I do not put all my enforcement eggs in one basket. I think this Congress, the President, and this administration is committed to small business and is committed to the enforcement in a variety of ways of small business interests in Government regulation. Frankly, the role of the chief counsel as an ombudsman is a different role than one sees the court playing, and I think it can be just as effective in a lot of ways, making this Congress aware of what is going on and having oversight hearings on a regular basis, looking at agencies' budgets, looking at the appointment process. There are many ways to enforce a law, and judicial review is only one of them.

Certainly, government by judiciary is not something that we look with much favor on today, and I think there are alternative solutions for enforcing this law as it now stands, which may turn out to be just as effective.

Senator HATCH. Thank you, Dean. Let me just ask you a question or two. Is this annual report to the President and the Congress an adequate tool to insure regulatory flexibility enforcement by the chief counsel for advocacy?

Mr. VERKUIL. By itself, it may not be adequate, Senator Hatch. I think it is very effective, though, because I like to call it a winers and sinners list at the end of the year, and you know who is on the right side and who is not, and that is a way of publicizing it. I think, combined with oversight hearings at budget time and other times, and with the appointment process, it becomes an effective tool, yes.

Senator HATCH. I see. Do you believe that the ability of the Chief Counsel for Advocacy to appear as an amicus is an additional and necessary tool with which to enforce the Regulatory Flexibility Act?

Mr. VERKUIL. Yes; I think that is an effective tool. It is not the same thing as having full judicial review, but I do think it allows the chief counsel carefully to select those worst cases where the underlying rule, as well as the regulatory flexibility analysis, are just very poorly done and to focus on those and get some judicial response, perhaps, in the occasional case.

Senator HATCH. Well, in your opinion, should the RFA be amended to clarify the judicial review section? What would you say about that?

Mr. VERKUIL. I do not think it is necessary. I believe the courts will shortly deal with it in such a way as to clarify any doubts that remain, and I frankly do not think it would be in the overall best interest of regulatory reform to expand judicial review very broadly in this case. I think it would discourage compliance; it would lead to more certifications and less regulatory analysis.

Senator HATCH. Well, thank you. I have a number of other questions I would like to submit to you, and I know that you have as busy a schedule as Dean, but I would like to have you answer those as quickly as possible for our record here. Is that OK?

Mr. VERKUIL. I would be glad to, yes.

Senator HATCH. Thank you.

[Responses to written questions from Senators Laxalt and Hatch and Mr. Verkuil's Duke Law Journal article follow:]

RESPONSES OF PAUL R. VERKUIL TO WRITTEN QUESTIONS FROM SENATOR PAUL LAXALT AND SENATOR ORRIN G. HATCH

Question 1. As we understand your statement, you predict that, if passed, S. 2170 could have a negative as well as a positive effect on agency compliance with the Regulatory Flexibility Act. Can you suggest a way to rephrase the bill so as to address this concern yet preserve the legislative intent of the Dodd amendment?

Answer. S. 2170 does about as well as it can in trying to solve a knotty problem of RFA coverage. I do not have any specific improvements of that amendment to suggest, except to say that enactment of S. 1080 would do much to ensure that agencies (especially DOD and IRS) would not be able so readily to aviod notice and comment rulemaking requirements.

Question 2. Mr. Bangert contends that without a broadly defined judicial review provision the Act is basically meaningless. Yet, you state that the Regulatory Flexibility Act can be efficiently implemented without significant judicial review. Could you elaborate on your view on how the Act can be implemented without a broad judicial review provision?

What other oversight mechanism could offer an effective and prompt remedy for an agency failure to comply with the Act in a particular case?

Answer. There are many ways to encourage agencies to implement the RFA other than judicial review. The appointment process, White House intervention and the congressional oversight process are important methods of ensuring compliance.

These compliance techniques are not nearly as effective as judicial review in remedying a failure to act in a particular case, but the role of the Chief Counsel for Advocacy as ombudsman for the RFA does offer the ability to highlight (and thereby correct through other methods) persistent failures by individual agencies to implement the RFA.

In terms of allocation of enforcement resources the question is simply how much oversight is necessary to fulfill the overall mandate of the RFA and at what institutional cost? Wide open judicial review would obviously ensure even greater compliance but courts and agencies have many other things on their agenda as well.

Question 3. In your opinion, exactly what scope of judicial review does section 611(b) of the Act provide?

Answer. See Duke Law Journal (enclosed) at 259–264.

Question 4. In your view, is a certification of "no significant impact" reviewable by the courts under any circumstances?

Answer. No.

Question 5. Do you believe the Regulatory Flexibility Act provides the Chief Counsel with authority to remedy particular abuses in individual rulemakings?

Answer. The Chief Counsel is able to intervene informally in individual agency rulemakings by reviewing and critiquing the Initial Regulatory Flexibility Analyses. The pressure he may bring to bear on agencies to improve their analyses include reports to the President and Congress and the appearance as amicus in an appeal of the underlying rule. In the latter circumstance the Chief Counsel may argue that the individual rulemaking should be overturned because of a failure to prepare an adequate Final Regulatory Flexibility analysis. This argument may support a reviewing court's inclination to hold a rule arbitrary and capricious and in that sense gives the Chief Counsel some limited ability to remedy particular abuses in individual rulemakings.

Question 6. Although it is not addressed in your statement today, could you briefly explain your views on the inclusion of colleges, universities and non-profit institutions under the Act?

Answer. Colleges, Universities and non-profit institutions are covered by the act in principle but it is highly unlikely that the Chief Counsel for Advocacy (who is concerned with small business) will represent their interests in fact. Therefore the act as presently designed will do them little good. Their problems are simply not central to the act's purpose.

Question 7. What effect, if any, has the Regulatory Flexibility Act had on small governmental entities to date?

Answer. I am not aware of any effect the RFA has had on small governmental entitites.

Question 8. Your law review article has an outstanding description of the Regulatory Flexibility Act, the Paperwork Reduction Act, and Executive Order 12291. Could you briefly explain the interrelationship of the three?

Answer. See Appendix to enclosed Duke Law Journal article.

Question 9. If enacted, how do you envision the relationship between S. 1080, the Regulatory Reform Act which passed the Senate recently, and the Regulatory Flexibility Act?

Answer. As I mentioned in the response to question 1, S. 1080 will do much foster the goals of the RFA by making more rules subject to regulatory analysis. It should create a regulatory environment that is more receptive to and competent about performing regulatory analysis. The RFA will remain of independent value however because of its specific small business (or small entity) focus.

Question 10. In your opinion, does the Regulatory Flexibility Act give the Chief Counsel for Advocacy authority to appear in any court of competent jurisdiction to present issues of both law and fact, including his views with respect to the effect of a rule on small entities?

Answer. As I understand the Chief Counsel's amicus role he can appear in any court where the underlying rule is being reviewed and argue issues of law, fact and policy relating to the effect of a rule on small entities.

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A CRITICAL GUIDE TO THE REGULATORY FLEXIBILITY ACT*

PAUL R. VERKUIL**

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I. INTRODUCTION

The Regulatory Flexibility Act (RFA),[1] enacted with little fanfare in the closing days of the Carter administration, imposes important

1. 5 U.S.C. §§ 601-612 (Supp. IV 1980).

new responsibilities on agencies that declare policy through rulemaking. For example, such agencies must now perform "regulatory flexibility analyses" as part of the rulemaking process.[2] As an additional complication to rulemaking, the RFA represents part of a central theme of regulatory restraint that will exist through the 1980's and that will ensure, in the words of President Carter, that "regulation gives Americans their money's worth."[3] In effect, Congress is now telling the regulator to "heal thyself" through careful and cautious policymaking.

The RFA is testimony to the political effectiveness of the small business lobby both inside and outside of government; indeed, the RFA was the only regulatory-analysis proposal to become law in the regulatory-reform-minded Ninety-sixth Congress.[4] The RFA is not, however, the only regulatory-analysis scheme to emerge from the recent regulatory-reform movement. A Carter administration executive order[5] introduced the concept of regulatory analysis to executive agencies and President Reagan has refined the concept with his own executive order, which mandates cost-benefit analysis.[6] The Paperwork Reduction Act[7] reduced for all agencies the reporting burden of complying with regulations. Moreover, the Ninety-seventh Congress is considering generic regulatory-reform proposals that mandate regulatory analysis.[8] Thus, the RFA is both a harbinger and microcosm of regulatory reform.

This article is a guide to the RFA. The article explores the assumptions underlying the RFA and analyzes its provisions. In addition, the article studies the RFA's relationship to other regulatory-analysis efforts and offers suggestions for integrating the RFA into the general scheme of regulatory reform.

II. Assumptions Underlying the Regulatory Flexibility Act

The RFA is a stunning achievement for the small business community and its representatives in government because it requires virtu-

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2. See notes 179-206 *infra* and accompanying text.

3. The White House, Regulatory Reform: President Carter's Program 2 (1980).

4. *Id.* 26.

5. Exec. Order No. 12,044, 3 C.F.R. 671 (1978), *revoked by* Exec. Order No. 12,291, 46 Fed. Reg. 13,193, *reprinted in* 5 U.S.C. app. § 601, at 124 (Supp. IV 1980).

6. Exec. Order No. 12,291, 46 Fed. Reg. 13,193, *reprinted in* 5 U.S.C. app. § 601, at 124 (Supp. IV 1980). For a discussion of the Executive Order and the RFA, see notes 228-42 *infra* and accompanying text.

7. 44 U.S.C. §§ 3501-3520 (West Supp. 1980). For a discussion of the Act, see notes 243-54 *infra* and accompanying text.

8. See notes 300-313 *infra* and accompanying text.

ally all government policymaking to be sensitive to small business concerns. This success is the culmination of the resistance of small business to increasing government regulation. Because of earlier legislative successes, small business was ready to take immediate advantage of an emerging movement away from government regulation. Its position was strengthened by the convincing argument that small business was bearing a disproportionate share of the regulatory burden on business and industry.

A. *Historical Concerns for Small Business.*

Since the passage of the Small Business Act (the Act)[9] in 1953, Congress has shown a special solicitude for the problems of small business. The Act provided small business with assistance in receiving government loans, in obtaining government contracts, and in securing technical and managerial know-how. It also established the Small Business Administration (SBA), which was to carry out the purposes of the Act under the direction of the President.[10] The initial thrust of the SBA was to study whether defense-procurement programs unfairly discriminated against or imposed undue burdens on small business and to recommend appropriate adjustments.[11] In 1958 Congress expanded the SBA's protective role by requiring government to transact a fair proportion of its purchases and sales with small business.[12] This legislation also permitted the use of variable size standards to define "small business" for procurement purposes.[13] Congress continued to recognize the needs of small business as the impact of government grew beyond defense procurement into other areas of the economy.[14]

By 1974 the overall loan, guaranty, and investment ceilings for

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9. Pub. L. No. 83-163, 67 Stat. 232 (1953) (current version at 15 U.S.C. §§ 631-647 (1976 & Supp. IV 1980)).

10. *See* 5 U.S.C. § 633(a) (1976).

11. *See* Small Business Act of 1953, Pub. L. No. 83-163, § 216, 67 Stat. 232.

12. Small Business Act Amendments of 1958, Pub. L. No. 85-536, § 2(a), 72 Stat. 384 (codified at 15 U.S.C. § 637 (1976 & Supp. IV 1980)).

13. *See id.* The term had previously been construed to mean firms with fewer than 500 employees. An interagency task force then determined that size standards should vary by industry. Thus, in the case of oil refineries, it was suggested that "small" refineries would be those with fewer than 1,000 rather than 500 employees. *See* S. REP. No. 1714, 85th Cong., 2d Sess. 7-8 (1958), *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 3071, 3077-78.

14. The Small Business Investment Act of 1958, Pub. L. No. 85-699, 72 Stat. 689 (codified at 15 U.S.C. §§ 661-696 (1976 & Supp. IV 1980)), encouraged the creation of privately-owned small businesses. The Small Business Act Amendments of 1961, Pub. L. No. 87-305, § 9, 75 Stat. 666 (codified at 15 U.S.C. § 636(d) (1976)), expanded the avaliability of grants to state agencies and to universities for researching and counseling small business enterprises. The Housing Act of 1961, Pub. L. No. 87-70, § 305, 75 Stat. 149, amended section 7(b) of the Small Business Act, 15 U.S.C. § 636(b)(3) (1976), to permit loans to small businesses displaced by urban-renewal activity.

small business had reached $6 billion.[15] Nevertheless, the small business constituency grew dissatisfied with the performance of the SBA. Small business trade associations, suggesting the SBA was mismanaged, claimed it no longer represented the small business community.[16] They called for the appointment of a Chief Counsel for Advocacy, creating a new position within the SBA, to serve as ombudsman to protect the interests of small business.[17] This remarkable notion — that an agency with a single constituency needed another organization within it to protect the interests of that constituency — garnered the support of Congress within two years.

In 1976 Congress established the Office of Advocacy. The Office would be headed by a Chief Counsel with broad powers to examine both the needs of and the burdens on small business.[18] The Chief Counsel's role included the evaluation of complaints against the SBA and other federal agencies and the preparation of recommendations concerning those complaints. Specifically, the Chief Counsel was admonished to "measure the direct costs and other effects of government regulation on small businesses; and make legislative and nonlegislative proposals for eliminating excessive or unnecessary regulations of small businesses."[19]

This change marked a dramatic shift of emphasis for the SBA, from protecting small business against a harsh economy to protecting it against a harsh bureaucracy. Undoubtedly reflecting a general discontent with government regulation,[20] especially the health, safety, and environmental regulations of the 1970s,[21] the shift provided the intellectual predicate for the legislation that would create the RFA four

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15. Small Business Act Amendments of 1974, Pub. L. No. 93-386 § 2(a)(3), 88 Stat. 742 (codified at 15 U.S.C. § 633(c)(4) (1976)), *as amended by* Act of Aug. 4, 1977, Pub. L. No. 95-89, § 101(c), 91 Stat. 553 (codified at 15 U.S.C. § 633 (Supp. IV 1980)).

16. *See The Regulatory Flexibility Act: Hearings on S. 1974 Before the Subcomm. on Administrative Practices and Procedures of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 142 (1977) (answers to questions by James McKevitt) [hereinafter cited as *1977 Senate RFA Hearings*].

17. *See* H. R. REP. No. 1178, 93d Cong., 2d Sess. 7, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4500, 4507-08.

18. Act of June 4, 1976, Pub. L. No. 94-305, 90 Stat. 668 (codified at 15 U.S.C. §§ 634a-634g (1976 & Supp. IV 1980)).

19. 15 U.S.C. § 634b(3) (1976). By this legislation the Chief Counsel was made something of a knight-errant for small business throughout government. All government agencies and departments were directed to furnish the Chief Counsel "such reports and other information as he deems necessary to carry out his functions." *Id.* § 634e.

20. *See, e.g.*, Exec. Order No. 11,821, 39 Fed. Reg. 41,501 (1974) (requiring executive agencies to consider the economic impact of certain rules and regulations on the business community).

21. *See, e.g.*, 122 CONG. REC. 13,781 (1976) (citing OSHA and ERISA as bills written "without adequate consideration of small business problems" and which made a small business advocate necessary) (remarks of Rep. Conte).

years later.[22] A Senate report to the White House in late 1979 set the stage for this development by emphasizing that "[m]any small business groups have suggested that SBA's only role should be to act as an advocate for small business within the Federal Government."[23] The White House Conference on Small Business, chaired by Arthur Levitt of the American Stock Exchange, was a grass-roots organization of small business people established to formulate and to debate the critical issues facing small business in the 1980's.[24] The Conference made sixty recommendations, many of which had a decidedly anti-regulation thrust.[25] One of the Conference's six specific policy goals for government was the elimination or reduction of onerous regulations and reporting requirements.[26]

It is difficult to overstate the impact the Conference had on the White House and on Congress in the election year of 1980. In that year four important pieces of presidentially supported small business legislation emerged from Congress. The Small Business Economic Policy Act of 1980[27] mandates the coordination of all federal departments and agencies in fostering the economic interests of small business and requires the President to submit an annual report to Congress assessing the impact of federal laws and policies on small business. The Equal Access to Justice Act[28] provides certain prevailing parties with recovery of attorneys' fees, witnesses' fees, and other costs resulting from litigation against the United States. The eligible parties include those who meet small business size and asset standards.[29] The purpose of this Act is to remove any deterrents a small business (or other qualifying litigant) may face in litigating against administrative agencies.[30] Further-

22. Because Congress did not confirm the first Chief Counsel, Milton Stewart, until July 1978, the Office of Advocacy did not begin its work until almost two years after Congress established it. *See generally Nomination of Milton Stewart to be Chief Counsel for Advocacy of the SBA: Hearings Before the Senate Select Comm. on Small Business,* 95th Cong., 2d Sess. (1978).

23. SENATE SELECT COMM. ON SMALL BUSINESS, 96TH CONG., 1ST SESS., DISCUSSION AND COMMENTS ON THE MAJOR ISSUES FACING SMALL BUSINESS 52 (Comm. Print 1979) [hereinafter cited as SENATE SELECT COMM.].

24. WHITE HOUSE COMMISSION ON SMALL BUSINESS, REPORT TO THE PRESIDENT: AMERICA'S SMALL BUSINESS ECONOMY 41-43 (1980) [hereinafter cited as WHITE HOUSE COMM'N].

25. The Report devoted 10 of its 60 recommendations to government regulation, paperwork, and economic policies that concerned small business. *See id.* 53-54.

26. *Id.* 29.

27. 15 U.S.C. §§ 631a-631b (Supp. IV 1980).

28. Pub. L. No. 96-481, § 203, 94 Stat. 2325 (codified at 5 U.S.C. § 504 (Supp. IV 1980) and other sections in titles 15, 28 and 42 U.S.C.).

29. The size standards exclude individuals with a net worth in excess of $1 million and businesses with a net worth in excess of $5 million or with more than 500 employees. 5 U.S.C. § 504(b)(1)(B) (Supp. IV 1980).

30. Pub. L. No. 96-481, § 202(c)(1), 94 Stat. 2325 (1980).

more, according to the SBA, the Act is to make government agencies cautious about bringing actions against small businesses.[31] The Paperwork Reduction Act,[32] the result of a four-year effort to reduce the paperwork burden the federal government imposes on business,[33] gives the Office of Management and Budget (OMB) control over the amount of paperwork generated by executive and independent agencies. Although the Act is not limited in its effect to small business, it was one of the specific recommendations of the White House Conference on Small Business.[34] Few regulations are more strongly objected to by the small business community than those increasing the burden of the federal government's reporting and record-keeping requirements.[35] The RFA, the fourth piece of small business legislation passed by Congress in 1980,[36] was a response to concerns about the differential impact of regulation on small business, concerns central to the recommendations made by the White House Conference on Small Business. The legislative successes of 1980 give substance to Article 1 of the Small Business Bill of Rights: "The right to start, own, and manage a business without government interference."[37]

B. *The Relationship Between Regulation and the Health of Small Business.*

1. *The Importance of Small Business.* The small business sector (as defined by the SBA) constitutes about ninety-eight percent of all nonfarm businesses and accounts for thirty-nine percent of the gross national product.[38] It employs over 100 million people, or fifty-eight percent of all business employment,[39] and is frequently the entry point for new ventures, which create new jobs. Furthermore, there is reason

31. *See* SBA, ANNUAL REPORT 22 (1980).

32. 44 U.S.C.A. §§ 3501-3520 (West Supp. 1981).

33. A good overview of previous paperwork-reduction efforts is provided in Neustadt, *Taming the Paperwork Tiger — An Experiment in Regulatory Management*, REGULATION, Jan./Feb. 1981, at 28.

34. WHITE HOUSE COMM'N, *supra* note 24, at 53 (recommendation 43).

35. For example, the Senate Select Committee on Small Business concluded that "[i]mproving government regulations, abolishing unnecessary regulations and reducing paperwork are goals that can and must be met." SENATE SELECT COMM., *supra* note 23, at 49.

36. Pub. L. No. 96-354, 94 Stat. 1165 (1980) (codified at 5 U.S.C. § 601-612 (Supp. IV 1980)). Another important piece of small business legislation enacted in 1980 was the Small Business Investment Incentive Act of 1980, Pub. L. No. 96-477, 94 Stat. 2275 (codified in various sections of 15 U.S.C.).

37. *See* WHITE HOUSE COMM'N, *supra* note 24, at 49.

38. U.S. SMALL BUSINESS ADMINISTRATION, FACTS ABOUT SMALL BUSINESS AND THE U.S. SMALL BUSINESS ADMINISTRATION 3-4 (1981).

39. *Id.* The SBA definitions of small businesses vary by industry and are elaborately developed in Standard Industrial Classifications. *See* OFFICE OF ADVOCACY, U.S. SMALL BUSINESS

to believe that the rate of innovation in small businesses is higher than in large businesses.[40] Many of our most innovative high technology companies such as those in the microprocessor industry began as small businesses. In times of increasing world-wide competition for industrial leadership, this source of technological innovation should be encouraged. Over the last twenty years, however, the small business sector of the economy has shrunk in comparison with the large business sector.[41] It is probably impossible to determine the optimal portion of the economy to be constituted by small businesses, for to some extent the growth of a complex economy may portend a shift to larger business entities as small businesses mature. Because there is no economic reason for government to promulgate policies that intentionally or unintentionally retard small business development, government policies unfavorable toward small business have become an increasing concern of the small business community.[42]

2. *Diseconomies of Regulatory Scale.* The point at which a business entity achieves economies of scale determines the optimum size of such an entity in a competitive, free-market economy. At that point growth is no longer necessary to produce goods more efficiently. Depending on the nature of the industry and its product mix, efficient size may or may not make a firm a small business by SBA definitions. Aside from the economic forces, often produced by government regulation, that increase firm size, there appear to be noneconomic forces, also often produced by government regulation, that require a firm to grow or, rather, penalize a firm for not growing.[43]

ASSOCIATION, THE STUDY OF SMALL BUSINESS, Pt. II (1977). Generally speaking, firms having fewer than 500 employees or less than $5 million in sales are classified as small businesses.

40. Determining how firm size affects the rate of innovation is not an easy matter. The SBA has conducted studies that indicate big business is less innovative than small business. *See* GELLMAN RESEARCH ASSOC., INC., THE RELATIONSHIP BETWEEN INDUSTRIAL CONCENTRATION AND TECHNOLOGICAL INNOVATION, (SBA Contract No. 2652-0A-79, Sept. 16, 1981) (Innovations per million employees: small firms-157; large firms-64) (on file with Duke Law Library). The SBA also recommends further study of the impact of increased merger activity on the rate of innovation. *See* 1 U.S. SMALL BUSINESS ADMINISTRATION, ANNUAL REPORT—FY 1980, 14.

41. In 1960, small and medium size manufacturers accounted for 50% of the manufacturing industry's assets; this portion had dropped to 33% by 1972. In 1953, 15% of the nation's gross private domestic investment was in small, nonfarm, noncorporate businesses, but in 1973 small business accounted for only 7.5%. 122 CONG. REC., 15,009 (1976) (remarks of Rep. McCollister).

42. Representative McCollister's comment on government policy is interesting: "If our national policy is to promote small business, that policy is failing." *See also* JOEL POPKID & CO., STRATEGY FOR A MICRO DATA BASE FOR SMALL BUSINESS — PROGRESS REPORT, (SBA Contract No. 2624-OA-79, Mar. 12, 1980) (on file with Duke Law Library).

43. *See 1977 Senate RFA Hearings*, *supra* note 16, pt. 1, at 126 (testimony of Milton Kafoglis).

Laws and regulations, intended for both large and small firms, are having an increasingly negative effect on the growth of small business. This negative effect occurs in two ways: because small businesses have fewer units of output over which to spread regulatory costs, regulatory costs are higher per unit of output; and small businesses lack requisite size to take advantage of economies of scale in regulatory-compliance, personnel, and data systems.[44]

Tax laws and regulations are a particular problem. Representative John McCollister of Nebraska recently highlighted the tax problems of small business:

> Perhaps the most devastating form which Federal antismall business discrimination takes is found in the tax code. The complexity of the code itself overwhelms small businessmen who lack trained legal and accounting departments and can ill afford to hire high priced consultants. In the area of the code's capital recovery provisions, for example, small business typically utilizes straight-line depreciation because they cannot afford the time or just plain cannot figure out how to use the more complex capital recovery devices which could give them a better tax situation. Large corporations, of course, are able to utilize the more complicated provisions and, as a result, pay lower effective tax rates than small businesses. As a class, the 100 largest corporations pay an effective rate up to 50 percent. Two years ago, a congressional study of corporate tax rates found that the Nation's largest 143 corporations paid an average tax rate of 23.4 percent. The average rate for all corporations was 33.4 percent.[45]

The complexity of the tax laws inevitably seems to favor larger businesses. Although some recent reforms in the tax laws have benefitted small businesses,[46] the overall impact continues to be negative.

Other agencies and programs that substantially burden small businesses include the Environmental Protection Agency (EPA), the Department of Energy (DOE), the Occupational Health and Safety Administration (OSHA), and the Employee Retirement Income Security Act (ERISA).[47] EPA's effluent-reduction regulations have a greater impact on small business than on large business because the regulations mandate compliance techniques that are less compatible with the pro-

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44. *See 1977 Senate RFA Hearings*, *supra* note 16, pt. 3, at 350-355 (remarks of Alfred Dougherty).

45. 122 CONG. REC. 15,009 (1976) (remarks of Rep. McCollister).

46. One example is the rate reduction on taxes of capital gains, which has encouraged the formation of venture-capital firms that invest in small business. *See* Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 102, 95 Stat. 186.

47. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified in various sections of titles 5, 18, 26, 31, and 42 U.S.C.).

duction technologies of small firms.[48] DOE's record-keeping requirements concerning oil and gas prices and volume are vague and unintelligible.[49] OSHA is faulted for its national-consensus standards, which burden small businesses that lack technical expertise to interpret the requirements.[50] The Internal Revenue Service (IRS) is criticized for promulgating unreasonable and complicated ERISA regulations that, rather than protecting employee pension rights, have the practical effect of terminating pension plans for employees of small businesses.[51]

Not only does the substance of regulatory laws frustrate small business, but small business also suffers acutely, on a cost-per-unit basis, from completing reports required by the IRS and other government agencies.[52] Studies show that the average cost of completing government forms per employee and per dollar of sales drops dramatically as firm size grows.[53] Although the IRS is the traditional nemesis of small business in this regard,[54] the new government agencies of the 1970s such as the Consumer Product Safety Commission, OSHA, and the Equal Employment Opportunity Commission, have refined mandatory reporting into a fine art.[55] Mandatory reporting has become a favorite tool of government, perhaps because it is a method of shifting and dispersing compliance costs from the agencies to the regulated entities. The small business community has objected to federal paperwork requirements for a variety of reasons. Most objections concern the number and complexity of reports, their lack of clarity, their frequency,

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48. *Small Business Impact Bill: Hearings on H.R. 7739 and H.R. 10632 Before the Subcomm. on Special Small Business Problems of the House Comm. on Small Business,* 95th Cong., 1st Sess. 89-96 (1978) (remarks of James Miller) [hereinafter cited as *Small Business Impact Bill Hearings*].

49. *Small Business Impact Bill Hearings*, *supra* note 48, at 314-18 (statement of Robert Amori).

50. *Id.* 127-29 (statement of James McKevitt).

51. *Id.* at 123-24 (statement of James McKevitt).

52. The cost to small business of complying with regulations has been described as a "regressive tax" because small business bears the same paperwork burden as large, multinational companies. *SBA's Paperwork Measurement and Reduction Program: Hearings Before the Senate Select Comm. on Small Business,* 96th Cong., 1st Sess. 50 (1980) (statement of Milton Stewart) [hereinafter cited as *Paperwork Reduction Hearings*].

53. *See The Regulatory Flexibility Act: Joint Hearings on S. 1974 and S. 3330 Before the Subcomm. on Administrative Practice and Procedure, Senate Comm. on the Judiciary and Senate Select Comm. on Small Business*, 95th Cong., 2d Sess., pt. 2, at 432-33 (1978) (Appendix "F").

54. It is estimated that 70% to 80% of the paperwork required of small business emanates from the IRS and state tax agencies. *Paperwork Reduction Hearings, supra* note 52, at 84.

55. The SBA has estimated that small business expends 130 million man-hours annually in filling out non-IRS forms. IRS paperwork requirements amount to 1,600 million man-hours, more than the total employee production of General Motors. *Federal Paperwork Requirements: Hearings Before the Subcomm. on Government Regulation and Paperwork, Senate Select Comm. on Small Business,* 96th Cong., 1st Sess. 2-3 (1979) (remarks of Sen. Hatch).

and the need for professional help from accountants and lawyers to complete them.[56]

The plight of small business is that the regulatory goals of society, ostensibly equal in impact, disproportionately burden small business. To some extent, small business is merely suffering the unequal consequences of equal treatment expounded by Anatole France.[57] But then, as now, when such treatment results in serious frustration of personal initiative, it is bound to become a subject for reform.

C. *The Problem of "Deregulating" Small Business.*

Much of the current "deregulation" movement has been inspired by the small business community's unhappiness with the existing pattern of regulation. Agencies and Congress are aware of the regulatory problem of equal treatment of unequals and attempted to institute differential reporting and compliance standards based on size, even before the advent of the Regulatory Flexibility and Paperwork Reduction Acts.

1. *The Conceptual Problems.* It would be satisfactory to almost everyone if one could prorate the costs of every government program according to company size.[58] But the complexity of regulation makes it virtually impossible to isolate compliance costs.[59] Indeed, any effort to do so would, as with attempts to design a regulatory budget,[60] embroil government in additional regulation of an unknown magnitude. Therefore, reform solutions have suggested releasing small businesses from certain regulatory requirements imposed on larger businesses or a reduction of responsibilities imposed by those requirements. But these solutions are not problem free.

Exemption from regulation may amount to economic protectionism for small business, with resulting undesirable consequences. The

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56. *Paperwork Reduction Hearings*, *supra* note 52, at 33-34 (statement of Milton Stewart). Mr. Stewart, Chief Counsel for the Office of Advocacy of the SBA, refers to these objections as small business' "paperwork lament." *Id.*

57. Anatole France berated "the majestic equality of the law that forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread." A. FRANCE, LE LYS ROUGE 117 (1894). For the view that this criticism of law undermines impartiality of justice, see F. HAYEK, THE CONSTITUTION OF LIBERTY 234-49 (1960).

58. Because smaller entities may "cost" more to regulate than larger entities, economies of regulatory scale may exist both in the regulator and the regulated.

59. The State of Washington conducted one of the few empirical studies on the costs of compliance with regulations. The study concluded that businesses with less than 50 employees have inordinately higher compliance costs than those businesses with over 50 employees. COLE & SUMMERS, COSTS OF COMPLIANCE IN SMALL AND MODERATE-SIZED BUSINESSES, REPORT TO THE SBA (1980). The results of this study suggest that other studies of this type, with larger sample sizes, would be profitable. *See id.* 28.

60. *See* Eads, *Harnessing Regulation — The Evolving Role of White House Oversight*, REGULATION May/June 1981, at 19.

health of small business is determined not only by the number that succeed, but also by the number that fail. To stifle the creative forces arising from the possibility of failure may serve only to keep inefficient entities alive. Moreover, the natural process of business growth is hampered if smallness is rewarded by deregulation, because firms are then encouraged to maintain a sub-optimal economic size.[61] While discouraging the growth and capital formation necessary for expansion and product development on the one hand, protective deregulation encourages nonproductive organizational devices to take advantage of government-established firm size limitations on the other.[62]

Another serious problem with deregulation of small business is the potential frustration of the substantive goals of regulation. The purpose of health, safety, environmental, and consumer regulation is to protect individuals in the public and in the work force. It is cold comfort to the miner who contracts black lung disease or to the textile worker who inhales cotton dust that he is less protected because his employer qualifies as a small business.[63] From a public policy standpoint, protection against these kinds of hazards must be stated in absolute terms, even when absolute protection is impossible despite great expenditures. This is the lesson of OSHA's refusal, accepted by the Supreme Court,[64] to adopt cost-benefit analyses in determining acceptable levels of worker exposure to harmful substances.

Furthermore, there is an equity problem with exempting small business from regulation — the problem of where to draw the line. At the margin, size standards draw meaningless distinctions,[65] but the reg-

61. Congress has been concerned about encouraging smallness for these reasons. Congress does "not want to create any disencentives to economic growth." 126 CONG. REC. H8461 (daily ed. Sept. 8, 1980) (remarks of Rep. Seiberling).

62. For example, the House discussion of the need for the RFA pointed out that DOE's crude oil entitlement program allows "small refineries" to purchase crude oil at reduced prices. As a consequence, 37 of 38 new refineries built between 1974 and 1977 were designed to process less than 40,000 barrels per day, the threshold of the entitlements program, whereas the minimum technologically efficient refinery size is 175,000 barrels per day. *See* 126 CONG. REC. H8467 (daily ed. Sept. 8, 1980).

63. Lack of protection can occur not only because protective legislation does not to apply to the small enterprises involved, but also because agencies internally modify enforcement resources and reporting requirements to reflect size considerations. Also, as Representative Seiberling has noted, Congress must be careful not to provide incentives for large business to spin off unsafe operations into smaller businesses not subject to strict regulation. This allegedly occurred in the case of the Allied Chemical plant in Hopewell, Virginia that was the source of keypone contamination in the James River. *See* 126 CONG. REC. H8461 (daily ed. Sept. 8, 1980) (remarks of Rep. Seiberling).

64. *See* American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 509 (1981).

65. What difference does it make, for example, whether a small business has 499 or 500 employees, or $4,999,000 or $5,000,000 in sales? The SBA admits that establishing size standards for small business in the middle (or "gray") area is very difficult. The SBA apparently considers

ulatory benefits they may carry are no less valuable. The exemption process may therefore be arbitrary in any individual case,[66] even if courts uphold it.[67]

2. *Congressional and Administrative Techniques for Adjusting Regulations to Size of Entity: "Tiering."* Despite conceptual difficulties, federal statutes and regulations have long acknowledged the relevance of size in determining their coverage. Perhaps the classic example of this deference to size is the "Mrs. Murphy" exemption to the Civil Rights Act of 1968,[68] which renders the housing non-discrimination provisions of the Act inapplicable to owner-occupied units of four families or less.[69] In this situation, as a matter of political expediency as well as potential impact, Congress thought it appropriate to subordinate the public interest against discrimination to individual interests in privacy.[70]

A series of administrative adjustments — often by the agencies most objected to by small business — also seek to reduce the regulatory burden on small firms. Some have taken the form of outright exemptions from compliance, such as OSHA's decision to eliminate reporting burdens for businesses with ten or fewer employees.[71] Both the Securities and Exchange Commission and the EPA have issued a variety of regulations that provide specific exemptions for small business.[72] In addition, some agencies have devised innovative regulatory plans that

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whether it should assist competition in given industries by including mid-sized firms within its definitions. *See Size Standards for Small Businesses: Hearings Before the Subcomm. on General Oversight and Minority Enterprise of the House Comm. on Small Business,* 96th Cong., 1st Sess. 17 (1980) (statement of SBA Associate Administrator Roger Rosenberger).

66. Regulatory discrimination based on the size of regulated entities has withstood constitutional challenges based on equal protection claims. *See* Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); Tigner v. Texas, 310 U.S. 141, 147 (1940).

67. Some courts have specifically upheld SBA size standards, *see, e.g.*, Otis Steel Prod. Corp. v. United States, 316 F.2d 937, 940 (Ct. Cl. 1963), and the SBA's refusal to consider affiliates of large businesses as "small." *See* American Elec. Co. v. United States, 270 F. Supp. 689, 691 (D. Hawaii 1967); Springfield White Castle Co. v. Foley, 230 F. Supp. 77, 78-79 (W.D. Mo. 1964).

68. 42 U.S.C. § 3603(b)(2)(1976). Mrs. Murphy was the name given to the imaginary constituent whose rooming house would not be subject to the law. *See Civil Rights — the President's Program: Hearings on S. 1731 and S. 1750 before the Senate Comm. on the Judiciary,* 88th Cong., 1st Sess. 31-32 (1963) (remarks of Sen. Ervin). *See also* 42 U.S.C. § 2000a(b)(1)(1976) (excluding accommodations of five rooms or less).

69. *See, e.g.,* Fred v. Kokinokos, 347 F. Supp. 942, 944 (E.D.N.Y. 1972). The question has been raised whether this exemption also applies to the 1866 Civil Rights Act, 42 U.S.C. § 1982 (1976). *See* Morris v. Cizek, 503 F.2d 1303, 1304 (7th Cir. 1974) (per curiam).

70. *See* Note, *Public Accomodations: A Justification of Title II of the Civil Rights Act of 1964*, 16 W. RES. L. REV. 660, 672 (1965).

71. *See Paperwork Reduction Hearings*, *supra* note 52, at 51 (statement of Milton Stewart).

72. *See, e.g.,* 17 C.F.R. § 230.257 (1981) (exception for offerings of securities less than $100,000); 40 C.F.R. § 21 (1981) (EPA small business exemptions).

are intended to minimize the impact of regulations on small business.[73] For example, the EPA's bubble concept allows businesses some flexibility in reducing total emissions by placing an imaginary bubble over an entire plant and demanding only that overall emissions levels meet established standards rather than requiring each stack within the plant to be of the most efficient design.[74]

This method for adjusting government regulation to the needs of small business is known as "tiering."[75] Tiering allows an agency (or in some instances Congress itself) to tailor regulatory requirements to fit the particular needs of the regulated entities. The predominant method of tiering uses the size standards promulgated by the SBA, which can be used both in graduated stages and in a single division.[76] In addition to size standards, some agencies have determined appropriate tiers by degree of risk, technological and economic ability to comply, geographical location, and level of federal funding.[77] In 1981 the Regulatory Council collected 190 examples of tiering permitted by fourteen executive and twelve independent agencies.[78] This trend will probably continue as agencies look for ways to meet the objections of their smaller but increasingly influential constituents.

III. Legislative Background and Overview

Though the RFA was a congressional response to the complaints of small business about the burdens of federal regulation, its impact is more general, as its placement in Title 5 of the United States Code (amending the Administrative Procedure Act (APA))[79] suggests. Emerging from a broad-based concern with regulatory reform, the RFA represents not only a triumph of regulatory analysis as a statutory concept, but also a part of a larger, still evolving legislative trend.

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73. The SEC, for example, has created an Office of Small Business Policy to review its rules with a view towards minimizing burdens on small business.

74. *See* 126 Cong. Rec. S10,937 (daily ed. Aug. 6, 1980) (discussion in the Senate's section-by-section analysis of the bill).

75. *See generally* U. S. Regulatory Council, Tiering Regulations: A Practical Guide (1981).

76. In fact, the White House Conference on Small Business recommended that SBA size standards themselves be designed with multiple tiers rather than in a single division. *See* White House Comm'n, *supra* note 24, at 59 (resolution 8).

77. *See* U.S. Regulatory Council, *supra* note 75, at 4-6.

78. *Id.* 41-54.

79. 5 U.S.C. §§ 551-559, 701-706 (1976 & Supp. IV 1980).

A. *A Brief Legislative Review.*

Although the RFA quietly appeared at the end of the term of the Ninety-sixth Congress, it has a lengthy and complex legislative history. Senators Culver and Nelson first introduced a bill (S. 1974) entitled "The Regulatory Flexibility Act" in the Ninety-fifth Congress.[80] Senate hearings were held on the bill during 1977 and 1978, resulting in various amendments.[81] The bill passed the Senate on October 14, 1978, but because of a lack of activity in the House, no further action was taken on the bill during the Ninety-fifth Congress.[82]

At the beginning of the Ninety-sixth Congress, activity on regulatory flexibility increased. Senator Culver reintroduced his original bill as S. 299 on January 31, 1979.[83] On the same day, Representative Ireland introduced a bill in the House entitled "The Small Business Regulatory Relief Act,"[84] which was similar in purpose to Senator Culver's bill but was cast as an amendment to the Small Business Act.[85] The Senate and the House extensively examined their respective bills over the next six months.[86]

Simultaneously, other independently conceived legislative efforts were forming that related to the existing small business efforts. Two omnibus regulatory-reform bills were introduced that applied the concept of regulatory analysis to all administrative agencies. Senator Ribicoff introduced a regulatory-reform act in the Senate and Representative Rodino introduced one in the House.[87] The Carter adminis-

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80. S. 1974, 95th Cong., 1st Sess., 123 CONG. REC. 25,844 (1977).

81. Hearings on S. 1974 as amended were held on October 7, 1977, and August 23, 1978 before the Subcommittee on Administrative Practice and Procedure, which unanimously and favorably reported S. 1974 to the Judiciary Committee on September 9, 1978. *See* S. REP. NO. 1322, 95th Cong., 2d Sess. 2 (1978).

82. Representatives Kastenmeier and Baldus introduced H.R. 11,376, the House companion bill to S. 1974 on March 8, 1978, but no action was taken on it. The House also had two other bills on small business impact before it, but no further activity took place in the House after S. 1974 passed the Senate. *See generally Small Business Impact Bill: Hearings on H.R. 7739 and H.R. 10,632 Before the Subcomm. on Special Small Business Problems of the House Comm. on Small Business*, 95th Cong., 2d Sess. (1978).

83. S. 299, 96th Cong., 1st Sess., 125 CONG. REC. S907 (daily ed. Jan. 31, 1979) [hereinafter cited as S. 299]. Representatives Kastenmeier, Baldus, and Harkin introduced the House companion bill, H.R. 1971, one week later. 125 CONG. REC. H556 (daily ed. Feb. 8, 1979).

84. H.R. 1745, 96th Cong., 1st Sess., 125 CONG. REC. H404 (daily ed. Jan. 31, 1979).

85. 15 U.S.C. §§ 631-647 (1976 & Supp. IV 1980).

86. *See* S. REP. NO. 878, 96th Cong., 1st Sess. (1980) (accompanying S. 299); H.R. REP. NO. 519, 96th Cong., 1st Sess. (1979) (accompanying H.R. 4660). H.R. 4660 became the principal House bill on which hearings centered. It was an expansion of H.R. 1745, and was introduced by Representative Gore on June 28, 1979. 125 CONG. REC. H5420 (daily ed. June 28, 1979).

87. *See* S. 1291, 96th Cong., 1st Sess., 125 CONG. REC. S7128 (daily ed. June 6, 1979); H.R. 3263, 96th Cong., 1st Sess., 125 CONG. REC. H1737 (daily ed. Mar. 27, 1979).

tration also introduced a comprehensive regulatory-reform bill with regulatory analysis as its centerpiece.[88]

As this activity demonstrates, regulatory reform was a major theme of the Ninety-sixth Congress. The number of bills and of legislative days devoted to the topic formed an impressive proportion of the Congress' work.[89] After all the dust had settled, however, only the small business reform bills survived,[90] and even those went through considerable debate and change before becoming law.

The major Senate and House bills on regulatory flexibility[91] (each of which went through extensive hearings) differed in significant ways. The Senate bill amended the APA; the House bill amended the Small Business Act.[92] The House bill relied more heavily on a select list of methods (including tiering) for reducing the burden on small business, whereas the Senate bill listed its methods as examples and required only that the agency explain its rejection of any methods. The Senate bill covered small governmental jurisdictions; the House bill did not. Finally, the Senate version as introduced had a limited provision for judicial review, a matter the House version did not address.[93]

The Senate bill, S. 299, eventually became law when the House passed it without amendment on September 8, 1980.[94] The House held no separate hearings on the Senate bill; rather, it simply adopted the Senate's description and section-by-section analysis of the bill.[95] The House was content with a three-page "Discussion of the Issues" that contained the statement that the House Report on the House bill was "incorporated by reference into the legislative history of the present bill."[96] That statement must be read with caution, however, because the House bill did not become law; any conflicts in interpretation should be resolved by a comparison of the Senate's "Description of Major Issues"[97] and the House's "Discussion of the Issues."[98] The Sen-

88. *See* S. 755, 96th Cong., 1st Sess., 125 CONG. REC. S3338 (daily ed. Mar. 26, 1979).

89. The session also produced a comprehensive study of federal regulation. *See* SENATE COMM. ON GOVERNMENT OPERATIONS, STUDY ON FEDERAL REGULATION, 95th Cong., 1st Sess. (1977).

90. To illustrate the popularity of small business in Congress, there has not been a single negative vote cast against any regulatory flexibility bill, in subcommittee, in full committee or on the floor, since the first bill was introduced in 1977. *See* 126 CONG. REC. H8470 (daily ed. Sept. 8, 1980).

91. S. 299, *supra* note 83, and H.R. 4660.

92. H.R. 4660 did, however, borrow the definitions of "agency" and "rule" from the APA. 5 U.S.C. § 551(1)(4) (1976).

93. See note 86 *supra*.

94. 126 CONG. REC. H8548 (daily ed. Sept. 8, 1980).

95. *See id.* H8468-80. The Senate description and analysis is set forth at 126 CONG. REC. S10,934-43 (daily ed. Aug. 6, 1980).

96. *Id.* H8468.

97. *See* 126 CONG. REC. S10,934-43 (daily ed. Aug. 6, 1980).

ate bill had reached the floor of the Senate on August 6, 1980, and had been presented by Senator Byrd of West Virginia in the form of a substitute amendment[99] whose principal purpose was to recodify the bill from sections 551 and 553 of title 5 to a new chapter (sections 601-612).[100] It passed the Senate in that form on the same day.[101] The President signed the bill into law on September 19, 1980.

B. *Overview of the RFA.*

The RFA proceeds from an optimistic assumption: highlighting the problems of small business and offering suggestions will allow agencies to solve problems they have largely created, thus obviating any need to deregulate small business through outright statutory exemptions. This process of self reform assumes a receptive bureaucracy.[102]

The RFA's structural limitations are crucial. It applies only to the substantive rulemaking process under the informal rulemaking provisions of the APA and of related organic legislation.[103] Thus, by its terms, the RFA does not apply to the vast amount of administrative activity that is not rulemaking, whether it be adjudication or the virtually unlimited realm of informal action.[104] Moreover, it does not even reach rulemaking that is not subject to notice and comment.[105] Therefore, the RFA does not address many of the problems small business faces with agencies such as the IRS that operate more through report-

98. *See* 126 CONG. REC. H8468-70 (daily ed. Sept. 8, 1980).

99. *See* 126 CONG. REC. S10,931 (daily ed. Aug. 6, 1980). To the extent the unprinted amendment varied from S. 299, the Senate "Description of Major Issues" accompanying the amendment may be a better source of congressional intent than the Senate report accompanying the original S. 299.

100. *Id.* S10,930-31.

101. *Id.* S10,944.

102. It is not entirely fair to evaluate agency performance historically. With increasing frequency agencies have developed techniques for responding to the special problems of small business. See text accompanying notes 71-78 *supra*. Moreover, the appointment process puts persons into leadership positions whose outlooks are undoubtedly more receptive to small business problems.

103. The RFA defines "rule" to include "any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law." 15 U.S.C. § 601(2) (Supp. IV 1980). For a discussion of these provisions, see text accompanying notes 155-69 *infra*.

104. Although precise figures are impossible to obtain, estimates suggest that about 90% of government action is informal. *See* Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 741 (1976).

105. Some examples of this type of rulemaking are interpretative rules, and other rules exempted from 5 U.S.C. § 553(b) (1976). Also, rules of "particular applicability" such as ratemaking are excluded. 5 U.S.C. § 601(2) (Supp. IV 1980).

ing requirements, individual actions, and interpretative rules than through substantive rules.

The RFA does not mandate any particular outcome in rulemaking. It requires consideration of alternatives that are less burdensome to small business, but it only requires that agencies explain why those alternatives were rejected.[106] The RFA extends this process to agency evaluation of existing rules over a ten-year period.[107] Although it gives the courts and the Chief Counsel for Advocacy some limited responsibilities,[108] it provides few express enforcement powers.

The Office of Advocacy of the SBA is to administer and to implement the RFA. This is a natural place to lodge oversight responsibility from the point of view of the small business community, for that community looks on the Chief Counsel's office as a safe harbor in the unfriendly world of regulation. Difficulties with the role of the Office of Advocacy under the RFA do exist, however. The Office is clearly small business and not small entity oriented. Thus, to the extent small organizations and small governmental jurisdictions seek a supportive advocate, they may not find one in the Chief Counsel.[109] Moreover, the Office of Advocacy may be hard pressed to provide the kind of professional guidance to agencies that more established oversight agencies like the OMB could provide.

The RFA adds certain steps to the typical rulemaking process. Rulemaking under APA section 553 involves four distinct steps: (1) publication of the proposed rule in the *Federal Register*; (2) receipt of written and oral comments from the public; (3) possible modification

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106. The note following section 601 of the RFA states:

> (b) It is the purpose of this Act ... to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

5 U.S.C. § 601 app. at 124 (Supp. IV 1980).

Section 603 requires consideration of at least four alternatives: (1) tiering; (2) clarification, consolidation, or simplification; (3) performance rather than design standards; and (4) exemptions. *Id.* 603(c).

107. *Id.* § 610. The ten-year period may be extended, on notice, in annual increments for up to an additional five years. *Id.*

108. The Office of Advocacy's best enforcement weapons are publicity through its annual reports on agency compliance to the President and to Congress, *id.* § 612(a), and through amicus appearances in court when the rule is under review. *Id.* § 612(b). The role of the courts on review is very limited. See notes 270-83 *infra* and accompanying text.

109. The Office of Advocacy responds to its small business constituency as required by its mandate. Other small entities either do not have equivalent advocates in government or if they do —education, for example — they are located in other agencies.

of the proposed rule in light of the comments; and (4) publication of the final rule in the *Federal Register* with a statement of basis and purpose.[110] Under the RFA the following additional steps must be taken: before a proposed rule is published, the agency must prepare an Initial Regulatory Flexibility Analysis (IRFA), which it publishes along with the proposed rule,[111] unless it certifies in the *Federal Register* that the rule will not "have a significant economic impact upon a substantial number of small entities;"[112] the IRFA or the certification must be sent to the Chief Counsel for Advocacy, published in the *Federal Register*, and actual notice must be sent to affected small entities;[113] during the comment period, the agency should hold conferences and public hearings on the rule as it affects small entities;[114] and, after the comment period, the agency must prepare a Final Regulatory Flexibility Analysis (FRFA) along with its final rule and statement of basis and purpose (unless it has made a certification as noted above). The agency also has continuing responsibilities to review the rules periodically and to publish biannual regulatory agendas.[115]

IV. Analysis and Critique of Pivotal Provisions

Though numerous questions arise under the RFA,[116] they cluster around several broad inquiries: Who does the RFA cover (or what is the meaning of "small entities")? Which agencies and rules are within its scope? How is the certification process to be administered? What does the regulatory-flexibility process demand? What does the agency rule-review process contemplate? What is the role of the courts on review; and what is the role of the Office of Advocacy? This article will consider each of these inquiries in turn.

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110. *See* 5 U.S.C. § 553 (1976).

111. *Id.* § 603(a) (Supp. IV 1980).

112. *Id.* § 605(b).

113. *Id.* § 609(3).

114. *Id.* § 609(4).

115. The RFA requires that agencies publish in the *Federal Register* a plan for a review of their rules within ten years. *Id.* 610(a). Additionally, agencies must publish annually a list of rules that significantly affect small entities and that will be reviewed during the succeeding year. *Id.* § 610(c). This latter requirement may be viewed as an additional procedure imposed on section 553 rulemaking.

116. Milton Stewart, the first Chief Counsel for Advocacy, has published a useful introduction to the RFA that answers some preliminary questions. Stewart, *The New Regulatory Flexibility Act,* 67 A.B.A.J. 66 (1981). The recently confirmed Chief Counsel, Frank Swaim, is a former counsel to the National Federation of Independent Business, and like Mr. Stewart, was active in the legislative efforts that produced the RFA.

A. *The Definitional Components of "Small Entities."*

The RFA is law because of the support it received from small business, whose needs are its obvious focus. Yet its definitional section subsumes small business within the term "small entity," a term that also includes "small organizations" and "small governmental jurisdictions."[117] These latter two terms greatly expand the potential coverage of the RFA, but they also introduce substantial definitional difficulties.

The term "small business" has generally accepted meanings, established by the SBA; the RFA incorporates those meanings by reference. Moreover, the RFA requires any agency that seeks to alter the established definition of "small business" first to consult with the Office of Advocacy and to allow an opportunity for public comment.[118] Because the established definition of small business relates to loan and procurement functions,[119] there may be a tendency for agencies to seek new definitions for RFA purposes. While this may complicate the task of the Office of Advocacy,[120] careful consultation between agencies and the Office of Advocacy can produce more useful definitions.[121]

The two other definitional categories — small organizations and small governmental entities — are not familiar to agencies and the Office of Advocacy does not have the same consultative role with respect to their formulation. Thus, problems of coverage will undoubtedly emerge as individual agencies attempt to define these terms.

1. *The Meaning of "Small Organizations."* Section 601(4) of the RFA provides:

> [T]he term "small organization" means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register . . . .[122]

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117. 5 U.S.C. § 601(3)-(6) (Supp. IV 1980).

118. *Id.* § 601(3).

119. See note 39 *supra*.

120. The former Chief Counsel indicated a preference to retain established meanings of "small business." *See* Stewart, *supra* note 116, at 67.

121. The SEC provides a good example of successfully creating new definitions of "small business" and "small organization" as applied to securities issuers and registrants of securities exchanges. *See* Notice of Proposed Rulemaking, 46 Fed. Reg. 19,251 (1981). The SEC had a productive exchange of views with the Office of Advocacy concerning the new definitions. *See* Letter from A. J. Prendergast, Acting Chief Counsel for Advocacy, to George Fitzsimmons, Secretary of the SEC (May 27, 1981). The SEC also requested public comments on whether its rules would have a "significant economic impact upon a substantial number of small entities." 46 Fed. Reg. 19,251 (1981).

122. 15 U.S.C. § 601(4) (Supp. IV 1980).

(a) *Legislative guidance.* The "Description of Major Issues" and the section-by-section analysis that accompanied the Senate discussion on the RFA[123] (and which the House incorporated by reference)[124] discuss the small organization concept and take the general approach that an agency applying them is to be "guided by the same considerations which were used in developing the definition of small business."[125] The Senate analysis lists three such considerations: a business must be (1) independently owned and operated; (2) not dominant in its field; and (3) must fall within the SBA size standards.[126] The last consideration is applicable to small organizations only by analogy.[127]

There are only a few potential small organizations actually named in the Senate analysis. It lists the YMCA/YWCA and the Boy Scouts/Girl Scouts simply to indicate that their nationwide status does not automatically disqualify them as small organizations[128] on the ground that they are dominant in their field.[129] The House did not discuss any examples in its section-by-section analysis of its bill; furthermore, the House bill's definition of "small organization" varies from that which became law: it included "unincorporated businesses" and "sheltered workshops" as well as non-dominant, independent, nonprofit enterprises.[130] One must question whether the House defini-

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123. 126 CONG. REC. S10,934-43 (daily ed. Aug. 6, 1980).

124. *See* 126 CONG. REC. H8468 (daily ed. Sept. 8, (1980)). See notes 96-97 *supra* and accompanying text.

125. 126 CONG. REC. S10,940 (daily ed. Aug. 6, 1980).

126. *Id.*

127. SBA size standards concerning number of employees (under 500) or dollar amount of sales (under $5,000,000) may or may not be useful standards in nonprofit organizations.

128. 126 CONG. REC. S10,940 (daily ed. Aug. 6, 1980). The section-by-section analysis indicates that these organizations should be tested by other criteria such as structure and operating characteristics at the local level, organizational resources, and ability to comply with rules and reporting requirements. This latter characteristic seems to confuse definitional problems with substantive ones, and serves to highlight the difficulties agencies will face in applying the small organization standard.

129. "Dominance" is to be given a "liberal" interpretation so as not to disqualify nonprofit organizations. *Id.*

130. *See* H.R. 4660, § 210(2), *discussed in* H.R. REP. NO. 519, 96th Cong., 1st Sess. 29-30 (1979). An earlier draft of S. 299 contained definitional terms similar to those in H.R. 4660. *See* S. 299, 96th Cong., 1st Sess., 125 CONG. REC. S907 (daily ed. Jan. 31, 1979). This language also appeared in earlier bills. *See* S. 3330, 95th Cong., 2d Sess., 124 CONG. REC. S11,499 (daily ed. July 21, 1978); S. 1974, 95th Cong., 2d Sess., 123 CONG. REC. 25,844 (1977). The Senate Judiciary Committee eliminated those terms from S. 299 when its Committee reported the Bill on May 5, 1980. This may turn out to be a distinction without a difference in practice, however, because unincorporated businesses are likely to be picked up in the definition of small business, and sheltered workshops may simply be included within the overall definition of small organization. Given the generous nature of the definition section, there apparently is no intent to exclude these two types of organizations from coverage under the RFA.

tions can be used in the unlikely event of definitional conflicts.

Further examples of what Congress intended "small organizations" to include are hard to find in the legislative hearings. The only category of small organizations that is mentioned is that of colleges and universities. In the hearings on S. 1974, the predecessor to the bill enacted, Thomas O. James, a representative of the National Association of College and University Business Officers, testified about the need small colleges — defined as having approximately 2,000 students and annual budgets of under $15 million — had for relief from federal regulations.[131] After his prepared statement, James had the following inconclusive exchange with Senator Culver, the chief sponsor of the Senate bill:

> SENATOR CULVER. As you read them, Dr. James, do you think that the definitions in the bill of a small business and a small organization include small universities?
> DR. JAMES. Yes, I do.[132]

In the hearings on S. 299, Sheldon Steinbach, General Counsel of the American Council on Education, submitted a written statement that supported the bill but that also urged that the bill "be amended to include colleges and universities."[133] The bill became law without the amendment. Thus, it is not obvious that colleges and universities are within the definition of small organizations or, if they are, whether only some of them are "small" under the above standards. On the other hand, given the paucity of discussion about the term "small organizations," colleges and universities, like other possible candidates for coverage (museums, charities, foundations, and the like) should be free to make arguments derived from the definition of "small organization." In addition, colleges and universities can argue that coverage is consistent with the RFA's apparent purpose of including small concerns that fall outside the definition of small business.[134]

(b) *The problems of applying the definition of colleges and universities.* Despite some question about the meaning of the term "small organization," there will undoubtedly be assertions that it applies to colleges and universities.[135] Problems with many kinds of regulations

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131. *1977 Senate RFA Hearings*, *supra* note 16, at 46 (statement of Thomas O. James).

132. *Id.* 49. Notice that S. 1974 contained a definition of small organization that was different from that which ultimately emerged from S. 299. See note 130 *supra* and accompanying text.

133. Letter from S. Steinbach, American Council on Education, to Senator Culver, (Sept. 24, 1979), *reprinted in Regulatory Reform: Hearings on S. 104, S. 262, S. 299, S. 755 and S. 1291 Before the Subcomm. on Administrative Practice & Procedure of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess., pt. 3, at 212-13 (1979) [hereinafter cited as *1979 Senate RFA Hearings*].

134. See text accompanying notes 123-26 *supra*.

135. Sheldon Steinbach, General Counsel of the American Council on Education, mailed a memorandum on November 5, 1980 to college and university presidents that asserted that all

in recent years have made the educational sector a strong ally of regulatory restraint.[136] The Department of Education has published its definition of those colleges and universities that fall under the RFA.[137] This definition is relevant in all proceedings before that agency and will presumably influence other agencies. The definition, which severely circumscribes the meaning of "small organization," serves to highlight some of the problems the educational establishment will face in arguing for coverage under the RFA.

The Department's definition of "small institution of higher education" includes all accredited colleges, public and private, that have a full-time equivalent student enrollment of fewer than 500 or an overall student population of fewer than 550.[138] This very narrow definition includes only twenty to twenty-five percent of all higher educational institutions and affects less than 2.5% of all students in higher education. Based on students affected, the definition creates a virtually de minimis category.[139]

The main problem with the small organization definition is that it does not appropriately categorize colleges, universities, and nonprofit institutions. For example, the language borrowed from the small business definition — "not dominant in its field" — makes the small organization definition difficult to apply. The question immediately arises whether any college or university is dominant in its field. Certainly some are prestigious and others are relatively large, but none would seem to qualify as dominant in the business or antitrust sense. Unlike

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independent and public colleges and universities are covered by the RFA (memorandum on file with Duke Law Library.)

136. The latest record-keeping and reporting requirements imposed by government agencies have been particularly burdensome for higher education. Problems include OSHA handicap-access regulations and ERISA pension regulations. *See* Steinbach letter, *supra* note 133. Perhaps no regulation has caused more consternation than OMB's Regulation A-21, which requires each faculty member's professional time to be accounted for and recorded on a periodic basis. *See* 44 Fed. Reg. 12,368 (1979) (revision of Federal Management Circular 73-8).

137. 46 Fed. Reg. 3920 (1981).

138. *Id.* at 3920 (1981). The Department circulated the proposed definition for public comment as required by the RFA. Although the comment period expired in February 1981, the definition has not yet been revised or promulgated. Recently the Department certified that small colleges and universities would not be significantly affected by a proposed rule that changed the reporting requirements for National Defense Student Loans. 47 Fed. Reg. 908,910 (1982). The Department made no reference to its proposed size standards.

139. Comments received by the Department of Education on its proposed size standards have criticized its approach. *See, e.g.*, Letter from Christine Milliken, General Counsel, National Association of Independent Colleges and Universities (Feb. 17, 1981); Letter from Sheldon Steinbach, General Counsel, American Council on Education (Feb. 17, 1981) (stressing that the narrowness of the standard defeats the purpose of the statute). Other commentators have argued for including all higher educational institutions within the definition. *See* Letter from Clauston Jenkins, Executive Assistant, North Carolina State University to U.S.D.E. (Feb. 9, 1981).

businesses, prestigious colleges and universities do not expand capacity to assert their dominance and to drive other institutions out of the market.[140] Thus, the dominance question is more appropriately resolved along the lines suggested in the Senate section-by-section analysis for other national nonprofit organizations.[141]

On the other hand, there are significant differences in size among colleges and universities. For example, one can draw distinctions based on asset or endowment size.[142] The assumption would be that those institutions with large endowments have more resources to comply with the regulations, an argument familiar to small business.[143] If one adds public institutions to this list on the ground that state funding guarantees their endowments, one can draw several significant definitional lines. If colleges and universities as a group are suffering from disproportionate regulatory burdens, however, then including all of them in the definition of small organization would better carry out the purpose of the RFA.

This discussion raises two points. First, when an individual agency decides to define "small organization," it should not necessarily use a dominance test.[144] Second, the definition is only for purposes of determining jurisdiction under the RFA. Although deemed to be within the RFA definition of a small organization a college might still be exempted when the agency promulgates any resulting rules. Tiering concepts, for example, may usefully discriminate between large, well-

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140. Prestigious private universities have a national dominance in the sense that students prefer them to other schools. But their prestige is measured more by the number of students they reject than by the number they accept. Although such universities experience some growth over time, they clearly do not grow to meet demand. State universities are somewhat different. In the last twenty years, there has been enormous growth in public-sector higher education because of unmet demand for higher education. With but a few important exceptions, public universities do not have national dominance, and even those that could rival the private universities are restricted by residency requirements. Thus unless one were to define states as sub-markets for educational-dominance purposes, it would be difficult to label public institutions as dominant.

141. See notes 128-29 *supra* and accompanying text.

142. Information on endowment size is readily available for the educational sector and the foundation sector. *See, e.g.*, INFORMATION PLEASE ALMANAC 709 (1982). By this measure, there are some clearly "dominant" institutions.

143. One cannot ignore that some institutions are better situated to comply with federal regulations than others. Concerning competition for federal grants and contracts, for example, those institutions that have achieved some economies of scale (because of research-grant size) have established offices funded by overhead charges that can produce the reports and records necessary to obtain and retain lucrative funding. In this sense, "research universities" as a category may be distinct from colleges whose primary role is teaching.

144. 15 U.S.C. § 601(4) (Supp. IV 1980) introduces two stages: (1) a definition of small organization that controls unless (2) an agency after public comment establishes and publishes definitions appropriate to the activities of the agency. There is nothing in the RFA or its legislative history that limits the second stage to the standards contained in the first.

endowed universities and small tuition-dependent colleges for purposes of particular regulations. The relevance of size standards changes according to the substantive goal of the regulation.[145] The purpose of the RFA is to aid as many small entities as possible by reducing the burdens of regulation. Definitions that include more entities at the outset and thereby allow agencies to address particular problems of the entities within the regulatory-flexibility context are much more likely to meet the RFA's corrective purpose.

2. *The Meaning of "Small Governmental Jurisdiction."* Section 601(5) of the RFA states:

> [T]he term "small governmental jurisdiction" means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register . . . .[146]

This definition is more precise than the definition of "small organization" and should not create as many interpretative difficulties.[147] It names the entities covered and establishes an objective population size limit of 50,000. Should an agency choose, after public comment, to establish its own definition, it is constrained by the explicit factors mentioned above.[148] The legislative background to this definition is less extensive than the legislative history of the term "small organization," but it does reveal one important change. The definition did not appear in the original Senate bill introduced by Senator Culver in August 1977,[149] but appeared later with the threshold population initially set at

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145. Some universities are better able to comply with reporting and record-keeping requirements than others. Size of student body, size of faculty, and annual budget should all be factors in deciding whether to tier the requirements of the rule. The rule itself will suggest when this is appropriate. If the rule involves reporting requirements concerning government grants and contracts, for example, the amount awarded per college or university is a relevant basis for differentiation.

146. 15 U.S.C. § 601(5) (Supp. IV 1980).

147. One complication may occur if public universities and colleges (failing to qualify under the "small organizations" standard because they are unincorporated, nonprofit institutions) instead seek to be included in the definition of "small governmental jurisdiction." The latter definition does not discuss higher educational institutions, but an agency may be able to include them as part of a separate definitional scheme.

148. Finding the RFA definition of small governmental jurisdictions inappropriate, the Department of Education undertook to define small local educational agencies in a manner that would "better carry out the intent of the Act." 46 Fed. Reg. 3920, 3921 (1981). Its definition, based on number of students (fewer than 1,500), has not been adopted.

149. *See* S. 1974, 95th Cong., 1st Sess., 123 CONG. REC. 25,844 (1977).

100,000.[150] There was no discussion in the Senate of the change of the threshold population level from 100,000 to 50,000.[151] One might infer from this change that Congress sought to limit the number of governmental jurisdictions that could take advantage of the RFA.

Population size will not always be a critical variable, however, and even when it is, the Senate section-by-section analysis seems to reduce its impact. The analysis states: "Definitions established by an agency need not adhere strictly to the 50,000 population standards nor are they restricted to the types of requirements the agency may impose under a rule affecting governmental jurisdictions."[152] This explanation appears to give some freedom to agencies to include governmental jurisdictions with populations above the 50,000 level as small entities. The implication of the legislative history is, however, to exclude such jurisdictions if they approach a population of 100,000.

B. *Agencies and Rules Covered by the RFA.*

The RFA borrows the APA's definition of "agency"[153] and, like the APA, casts a wide net over virtually all government agencies. Even the SBA is within the jurisdiction of the RFA. The ultimate question of coverage under the RFA, however, is whether the rules promulgated by the agency are within the scope of the RFA,[154] not whether the agency itself is subject to the Act. Much debate can be expected on this question.

Some agencies will consider themselves exempt from the RFA's coverage because they do not promulgate rules pursuant to section 553 of the APA "or any other law."[155] Problems arise when agencies, the

150. S. 3330, 95th Cong., 2d Sess. § 3(g)(4)(A), 124 CONG. REC. S11,499 (daily ed. July 21, 1978). This definition was added to S. 1974 when it passed the Senate on October 14, 1978. See text accompanying note 82 *supra*. When S. 299 was introduced, it contained the same definition as that in S. 1974. *See* S. 299, 96th Cong., 1st Sess., 125 CONG. REC. S907 (daily ed. Jan. 31, 1979).

151. The 100,000 population threshhold was still in S. 299 when it was reported by the Senate Judiciary Committee on May 5, 1980. *See* S. REP. NO. 878, 96th Cong., 2d Sess. 14 (1980). The population level was changed to 50,000 only in Senate Unprinted Amendment No. 1502, *see* 126 CONG. REC. S10,931-33 (daily ed. Aug. 6, 1980), which served as a substitute for S. 299 and passed the Senate on August 6, 1980. *Id.* S10,944.

152. 126 CONG. REC. S10,934, S10,940 (daily ed. Aug. 6, 1980).

153. *See* 5 U.S.C. § 601(1) (Supp. IV. 1980) ("the term 'agency' means an agency as defined in Section 551(1) of this title").

154. Thus, during the legislative hearings, some of those agencies that did not promulgate rules pursuant to section 553 of the APA, such as the Central Intelligence Agency, took no interest in the RFA. *See* Letter of Stansfield Turner to Senator Eastland (Jan. 19, 1978), *reprinted in The Regulatory Flexibility Act: Joint Hearings on S. 1974 and S. 3330 Before the Subcomm. on Administrative Practice and Procedure, Senate Comm. on the Judiciary and Senate Select Comm. on Small Business*, 95th Cong., 2d Sess., pt. 2, at 294 (1978).

155. 5 U.S.C. § 601(2) (Supp. IV 1980).

public, or the Office of Advocacy disagrees about whether some agencies must comply with section 553 or whether such "other law" (including perhaps procedural regulations) exists.

1. *What is a Section 553 Rule?* Section 553(a) of the APA exempts military or foreign-affairs functions from its rulemaking notice and comment requirements.[156] This exemption suggests that the Department of Defense and the State Department are excluded from the RFA's coverage, unless those agencies have organic legislation that require particular rules to be published for comment. APA rulemaking requirements also do not apply to agency rules on matters relating to agency management and personnel or to public property, loans, grants, benefits or contracts.[157] The RFA modifies this exemption by its definition of "rule," which specifically includes federal grants to state and local governments for which the agency provides opportunity for public comment.[158]

Section 553 of the APA contains other exemptions from its notice and comment requirements that should cause even greater consternation. Interpretative and related kinds of rules are exempted from the notice and comment requirement as are rules the agency exempts for good cause.[159] Concerning the former exemption, there may be some rules that an agency can validly exempt from notice and RFA requirements if they are clearly of the policy-oriented, interpretative variety. The RFA was, after all, designed to cover substantive rules that affect small entities. But frequently it is difficult to determine whether an interpretative rule is substantive in effect.[160] Subsequently, an agency

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156. *Id.* § 553(a)(1) (1976).

157. *Id.* § 553(a)(2).

158. *Id.* § 601(2) (Supp. IV 1980). This modification is difficult to justify; it partially reiterates the exemptions of the APA that the American Bar Association and the Administrative Conference of the United States are on record as opposing. *See* 3 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 3 RECOMMENDATIONS AND REPORTS 53 (Jan. 1, 1973 - June 30, 1974) (resolution no. 2). Agencies that have voluntarily assumed notice and comment obligations in these situations alleviate the problem to some extent. These agencies may balk, however, at voluntarily assuming the additional responsibilities imposed by the RFA; there is some question whether they are bound to assume those responsibilities. See notes 164-65 *infra*.

159. 5 U.S.C. § 553(b) (1976) provides in part:

> Except when notice or hearing is required by statute, this subsection does not apply -
>
> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
>
> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

160. *See* Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements,* 75 MICH. L. REV. 521, 545-53 (1977). Of particular concern to the intended beneficiaries of the RFA is the fact that the Treasury Department considers most IRS regulations to be of the interpretative variety.

may have problems ascertaining (when it establishes its regulatory agenda, for example) whether a particular rule is subject to the RFA.

The drafters of the RFA apparently did not fully contemplate the use of the good-cause exception to notice and comment procedures, a loophole that has fallen into disfavor in recent years with Congress and commentators.[161] Congress surely would not have provided agencies with such a convenient escape from regulatory-flexibility analyses; therefore, any agency that uses the good-cause exception for that purpose should be closely scrutinized by the SBA's Office of Advocacy. Agencies at the edge of compliance, whether because of the interpretative rule or good-cause exceptions, should be wary of opting out of the RFA process.

2. *The Meaning of "Other Law."* Two problems arise when defining "other law." The first is whether "other law" includes agency regulations as well as legislation.[162] Neither the RFA nor its legislative history answer this question; instead, one must seek guidance from related areas of administrative law. In many other situations regulations are regarded as law.[163] Such examples may be less persuasive in this context since Congress could have been more precise in the wording of the RFA. Nevertheless, agencies which voluntarily impose notice and comment requirements on themselves by regulation[164] should be subject to RFA requirements although they would not have been subject to these requirements had they not promulgated such procedural regulations.[165] Each agency so situated can certainly abrogate its RFA responsibilities by revoking its procedural regulations. As a practical policy matter, however, that may be difficult to do. Moreover, in many situations the reasons that lead an agency to adopt notice and comment procedures by regulation apply equally to the performance of regulatory-flexibility analyses.

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161. Several recent statutes have narrowed the applicability of the exemptions. *See, e.g.*, The Federal Hazardous Substances Act, 15 U.S.C. § 1262(e)(1) (1976); Poison Prevention Packaging Act, 15 U.S.C. § 1474(a) (1976). Professor Davis has recommended that this exemption be narrowed or eliminated. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 6.01 (1972).

162. See note 158 *supra* and accompanying text.

163. *See* B. SCHWARTZ, ADMINISTRATIVE LAW 59 (1976). Professor Schwartz cites regulations regarding river navigation, air traffic control, ICC safety rules and fish and game rules as examples of regulations that are routinely enforced in the same manner as statutes. *Id.* 157-60.

164. The Department of Health, Education and Welfare (HEW) (the predecessor of the Department of Health and Human Services), for example, voluntarily submitted its rulemaking to the notice and comment provisions of section 553. *See* 36 Fed. Reg. 2532 (1971).

165. *See* National Welfare Rights Org. v. Mathews, 533 F.2d 637, 648 (D.C. Cir. 1976). The *N.W.R.O.* court remanded a rule, which was subject to HEW's voluntary acceptance of notice and comment requirements, for failure to provide adequate factual findings. Had HEW not voluntarily undertaken to provide notice and comment, its rule presumably would not have received less scrutiny.

The "other law" problem is also raised when Congress imposes notice and comment responsibilities by statute on an agency that is otherwise free from the requirements of section 553 of the APA. One such agency is the Office of Federal Procurement Policy (OFPP), which supervises government contracts. Ordinarily government contracts are exempt from the notice and comment provisions of section 553 but the Administrator of the OFPP is required by statute to establish "criteria and procedures for an effective and timely method of soliciting the viewpoints of interested parties to comment."[166] The Administrator promulgated procedural regulations under this provision that provide for notice of rulemaking and an opportunity to comment.[167] Thus, both the statute and the regulations would seem to be "other law" for RFA section 601 purposes.

To some extent this automatic application of the RFA to procurement regulations may come as a surprise to Congress and to the Executive branch because they have long wanted to keep the government-contracting process free from extensive procedural entanglements. In fact, for this reason (among others) Congress did not make the provisions of section 553 of the APA directly applicable to procurement regulations[168] and the Carter administration excluded the OFPP from Executive Order 12,044.[169] Nevertheless, the definition of "rule" in section 601 of the RFA does not allow for individualized exceptions based on the "other law" requirement. It is likely that other agencies will also find themselves caught by the RFA in this fashion.

C. *The Certification Process.*

The RFA contains an escape clause so that even if it applies to the particular agency in question the regulatory-flexibility analysis still may not be required. Section 605(b) provides:

> Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial

166. 41 U.S.C. § 405(d)(3) (Supp. III 1979).

167. *See* 41 Fed. Reg. 34,324 (1976).

168. The legislative history of the statute that created the OFPP indicates a concern that notice and comment procedures be "effective and timely." Congress therefore left it to the administrator to evaluate the "benefits and burdens of notice and comment rulemaking." *See* H.R. REP. No. 1176, 93d Cong., 2d Sess. 15 (1979). Once OFPP promulgated procedural regulations it presumably decided that the benefits of notice and comment procedures outweighed the burdens, but it did not do so in light of the RFA.

169. *See* 43 Fed. Reg. 12,665 (1978). The extension of the Executive Order to OFPP was thought unnecessary, because the Office had issued procedural regulations. The Reagan administration's Executive Order No. 12,291, 46 Fed. Reg. 13,193, *reprinted in* 5 U.S.C. app., § 601, at 124 (Supp. IV 1980), contains no such exemption.

> number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register, at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a succinct statement explaining the reasons for such certification, and provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.[170]

Sections 603 and 604 prescribe the initial and final regulatory-flexibility analyses that are the chief tools of the RFA. Because agencies will undoubtedly try to avoid compliance with sections 603 and 604 by invoking section 605(b), the latter section is bound to be the source of much controversy.

The meaning of "significant economic impact upon a substantial number of small entities" is crucial to the RFA's implementation. Indeed, unless the phrase is satisfactorily defined the RFA will be a nullity.[171] That the words "significant" and "substantial" were both used provokes the question whether a different meaning is implied by the choice of two words that are otherwise synonymous. For the RFA to operate effectively, considerable attention must be given to the meaning of these terms.

1. *Legislative Background to the Certification Process*. There is little discussion of the phrase "significant economic impact on a substantial number of small entities" in the earlier legislative reports, but the phrase did receive attention from the Senate and the House in the reports accompanying S. 299.[172] The Senate stated that any attempt to define the term "significant economic impact" more precisely might be "counterproductive";[173] it also emphasized that in deciding what the

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170. 5 U.S.C. § 605(b) (Supp. IV 1980).

171. To date, most agencies appear to utilize the certification process for the vast majority of RFA dispositions. In the period July 1, 1981 to October 1, 1981, the Office of Advocacy logged 489 RFA dispositions; 412 were certifications, 19 were IRFA's, 18 were periodic (six month) reviews. The remainder were statements that the RFA did not apply at all. Statement of Frank S. Swaim, Chief Counsel for Advocacy of the SBA, before the Subcomm. on Export Opportunities and Small Business Problems of the House Comm. on Small Business (Oct. 7, 1981) at 16.

172. The phrase appeared in S. 299 as it was reported by the Senate Judiciary Committee on May 5, 1980. *See* S. 299, 96th Cong., 1st Sess., 126 CONG. REC. S10,931 (daily ed. Aug. 6, 1980). Earlier Senate and House bills also contained this wording. *See* S. 1974, 95th Cong., 1st Sess. § 3(5), 123 CONG. REC. 25,844 (1977); H.R. 7739, 95th Cong., 1st Sess. § 4, 123 CONG. REC. 18,620 (1977); H.R. 4660, 96th Cong., 1st Sess. § 207(b) 125 CONG. REC. H5420 (daily ed. Jan. 28, 1979). With slightly different phraseology, this wording appeared in the Senate omnibus regulatory reform bill, S. 2147, 96th Cong., 1st Sess. § 634, 125 CONG. REC. S19,039 (daily ed. Dec. 18, 1979). The omnibus reform bill stipulated that no regulatory flexibility analyses would be required if the agency determined that "the rule will not, if implemented, have an adverse effect on a substantial number" of small entities. *Id.*

173. 126 CONG. REC. S10,943 (daily ed. Aug. 6, 1980) (section-by-section analysis).

term "substantial number" meant, the agencies should consider the total number of firms affected, not the percentage of affected firms in the industry.[174]

The House, devoting a substantial portion of its three-page discussion of the issues to definitional problems,[175] stated that "the term 'significant economic impact' is neutral with respect to whether such impact is beneficial or adverse."[176] Thus, a rule's potential benefit to small entities does not discharge an agency from the regulatory-flexibility process since the agency does even more for them. The House discussion also addressed the question of what constitutes a "substantial number of small entities," concluding that "clearly, any anticipated rulemaking which common sense would suggest could have a direct, noticeable impact on several thousand or more small entities (of any type)"[177] should be included within the definition. The discussion continued with speculations on the numbers and percentages that might satisfy the term "substantial number":

> For example, if there were 500 small organizations of a certain description, and 200 of them would face major new reporting requirements if a certain rule were implemented, then the rule should be expected to have a significant economic impact on a substantial number of small entities (in this case small organizations). If there were only 25 small businesses in an industry dominated by 12 large businesses, then a rulemaking initiative which would threaten the economic viability of 15 of those small businesses, and thus adversely affect competition and industrial concentration, would have a "significant economic effect on a substantial number of small entities" within the meaning of the legislation, even though the absolute number of small businesses involved would be minuscule.[178]

Finally, the report indicated that "economic impacts include effects on competition and economic concentration," thus suggesting that antitrust market analysis may be relevant.[179]

2. *Administrative Implementation of the Certification Process*. There are two basic questions that will arise each time an agency decides whether to certify a rule under section 605(b): what is a "significant economic impact," and how many entities constitute a

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174. *Id.* In its discussion, the Senate appeared to equate "overwhelming percentage" with substantial number, although it refused to constrain itself with any particular definition.

175. 126 CONG. REC. H8468 (daily ed. Sept. 8, 1980).

176. *Id.* This interpretation is suggested by earlier drafts of the certification section that had used the term "substantial adverse" impact and that settled on "substantial impact." *See* S. 2147, 96th Cong., 1st Sess. § 634, 125 CONG. REC. S19,039 (daily ed. Dec. 18, 1979).

177. 126 CONG. REC. H8469 (daily ed. Sept. 8, 1980).

178. *Id.*

179. *Id.*

"substantial number"? The questions are interrelated and must be addressed together in the certification process.

In making a section 605 certification, certain steps must be followed. The certification must be made by an agency head (or his delegate) and must be published in the *Federal Register* with a statement of reasons accompanying the notice of proposed rulemaking (if the certification is made at that time).[180] The agency may decide not to make the certification at this stage because of the uncertain impact on small entities; instead, it will publish an initial regulatory-flexibility analysis.[181] This analysis may be the best way to determine the impact of a particular rule on small entities, because those entities that consider themselves in that category are permitted to address that question during the comment period. Once a certification is made, it must be forwarded to the SBA's Office of Advocacy.[182] Although the Chief Counsel of Advocacy is given no particular approval role, he may object to the certification. According to the House report, his objections should be given "the utmost serious consideration."[183]

(a) *The meaning of "significant economic impact."* The purpose of this phrase is to identify a regulation's costs or benefits to small entities. Costs should be isolated and measured. For example, an agency should consider an analysis of market share before and after the rule. Obviously, a rule that would drive small entities out of a given market would have a significant impact, as would a rule that jeopardizes their competitive position vis-a-vis large businesses. Other costs, so long as they are economic, should be considered. Costs of compliance with the regulation, for example, can be determined on an absolute and on a percentage-of-revenue basis. Reporting requirements may necessitate reorienting the workload of existing personnel or engaging outside professional assistance.[184] The agency should consider each cost and the net effect of all the costs resulting from the proposed rule.

Assessing the significance of these costs is naturally a subjective process; it is very difficult in the abstract to set objective standards. Compliance costs that equal a small business' profit margin — five to ten percent of annual sales — would satisfy most business definitions of "significant." If small businesses can reasonably say that the proposed

180. 5 U.S.C. § 605(b) (Supp. IV 1980).

181. *See id.* § 603.

182. *Id.* § 605(b).

183. 126 CONG. REC. H8469 (daily ed. Sept. 8, 1980).

184. *See* OFFICE OF MANAGEMENT & BUDGET, INCORPORATING REGULATORY FLEXIBILITY INTO THE REGULATION PROCESS: INTERIM GUIDANCE 6 (Dec. 1980) [hereinafter cited as OMB INTERIM GUIDANCE].

rule would significantly reduce their profit margin, then an agency, acting within the broad mandate of the RFA, should consider the costs "significant." The significance of the impact on small organizations and governmental jurisdictions will also best be determined on the basis of economic cost. Such additional costs must be considered in light of current operational costs in the particular field.

(b). *The meaning of "substantial number of small entities."* This aspect of the definition is slightly less subjective, because agencies can utilize simple arithmetic to reach a definition of "substantial number." The first step is to calculate the total number of entities affected by the rule; if that number is in the thousands, legislative history (and common sense) would designate it substantial. Because the absolute numbers will frequently not be so high, the agency should evaluate other factors, including the ratio of small and large entities affected, the number of industries affected, and the number of geographical areas affected.[185] The geographical area factor suggests an antitrust relevant-market definition.[186] If the proposed rule affects a substantial number of small entities within a given area, the definition can be satisfied even if this number represents a small percentage of the national total. In other words, a rule with only regional impact should not be tested by a national definition of "substantial." Presumably, the converse is also true, and thus small entities should make a careful study of the geographical reach of any rule.

The relevant product market is also a useful concept. SBA Standard Industry Codes[187] provide accepted definitions of particular lines of commerce that may be affected, thereby separating the market into meaningful parts. The question of substantiality will relate to the number of small businesses affected within that particular industry. Once the relevant product market is established, one may easily calculate the ratio of affected small entities over all small entities alone or small and large entities combined.

The legislative history suggests that forty percent of the small entities in given geographical or product markets would certainly qualify as a "substantial number."[188] Whether smaller percentages also qual-

185. *See* OMB INTERIM GUIDANCE, *supra* note 184, at 6-7.

186. For a discussion of relevant market shares and anticompetitive effects, see 4 P. AREEDA & D. TURNER, ANTITRUST LAW § 910a-910e (1980).

187. The SBA publishes a Standard Industrial Classification Manual which contains about 950 four-digit designations. *See* OFFICE OF STATISTICAL STANDARDS, U.S. DEP'T OF THE TREASURY, STANDARD INDUSTRIAL CLASSIFICATION MANUAL (1967).

188. The 40% figure is derived from the House discussion, see text accompanying notes 177-78 *supra*, which reasoned that if 200 of 500 small organizations face a particular regulatory burden, it is substantial. The House also listed an impact on 15 of 25 small businesses as substantial. 126

ify is less clear, but according to the legislative history any formula should be liberally interpreted to effectuate the coverage of the Act.[189] The substantiality question in the abstract continues to be difficult to answer; thus, the best advice to those seeking coverage is to prepare the strongest statistical case for the highest percentage of small entities affected.[190]

D. *Formulating the Initial and Final Regulatory-Flexibility Analyses.*

An important requirement of the RFA is that agencies proposing rules must consider the impact of those rules on small entities. The "principle of regulatory issuance" postulated by the RFA is that agencies should "fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation."[191] To accomplish this regulatory "fit," the RFA requires that every proposed rule subject to its jurisdiction be accompanied by an initial regulatory-flexibility analysis (IRFA) and that every final rule be accompanied by a final regulatory-flexibility analysis (FRFA).[192]

Each of these documents has a format with a common-sense purpose: to elicit the consideration, description, and explanation of the use or nonuse of certain regulatory alternatives.[193] The IRFA should suggest regulatory alternatives such as differing compliance and reporting requirements (in effect, "tiering"), simplification of those requirements, use of performance rather than design standards, and exemptions from the rule's coverage.[194] The FRFA must contain a succinct statement of the need for the rule, a summary of comments on the regulatory-flexibility alternatives, and a description and explanation for rejection of

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CONG. REC. H8469 (daily ed. Sept. 8, 1980). Although over-reliance on these percentages is tempting, 40% or more should clearly qualify as substantial by any definition.

189. In this context, the House discussion emphasizes that "the legislation is intended to be as inclusive as possible, and doubts about its applicability should be resolved in favor of complying with the provisions of the Act." 126 CONG. REC. H8468 (daily ed. Sept. 8, 1980).

190. Engaging in this kind of exercise is familiar to antitrust plaintiffs who try to define markets narrowly to maximize a particular firm's impact, and to antitrust defendants, who seek to define markets broadly to minimize their respective firms' impact. *See generally* 2 P. AREEDA & D. TURNER, *supra* note 186, § 507. In the RFA context, there is not likely to be a party with the incentives of an antitrust defendant to contradict the proffered small entity definition.

191. Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, § 2(b), 94 Stat. 1164, *reprinted in* 5 U.S.C. § 601 app., at 124 (Supp. IV 1980).

192. 5 U.S.C. §§ 603-604 (Supp. IV 1980). The IRFA may be waived or delayed in emergency circumstances if the agency head so states (and provides reasons); the FRFA cannot be waived, but it may be delayed for up to 180 days after the rule is promulgated on proper findings by the agency head. *Id.* § 608.

193. *Id.* §§ 603-604.

194. *Id.* § 603(c).

each "significant" alternative that the agency considered.[195] The FRFA must either accompany the final rule or be made available to the public on request.[196] Despite these fairly detailed instructions, several crucial questions of interpretation and application remain unanswered or inadequately resolved. Among these queries are the effect of contradictory substantive law on the regulatory-flexibility process, the actual analytical techniques required to satisfy the regulatory-flexibility process of analysis, and the relationship of the RFA to other regulatory-analysis requirements.

1. *The Effect of Contradictory Substantive Law.* The RFA states that it is not intended to contradict the requirements placed on agencies by organic legislation. In fact, the introductory note to the RFA admonishes agencies to engage in regulatory-flexibility analysis if such analysis is "consistent with the objectives of the rule and of applicable statutes."[197] Section 606 states that "the requirements of sections 603 and 604 of this title do not alter in any manner standards otherwise applicable by law to agency action."[198] Both sections 603 and 604 also emphasize that such analysis shall be "consistent with the stated objectives of applicable statutes."[199]

The legislative history deals with the question of statutory inconsistency in several ways. It is obvious that Congress did not want to use the RFA as a means of overruling statutory requirements.[200] The RFA in all likelihood would not have become law if it amounted to an implicit rejection of substantive legislative requirements, especially

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195. *Id.* § 604. Of course, one of the alternatives discussed in the IRFA may become the one chosen in the final rule, apparently the ideal outcome under the RFA.

196. No mention is made of who should bear the costs of copying and distribution, which means that the costs will presumably fall on the agency promulgating the rule unless it promulgates rules to the contrary.

197. *See* Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, § 2(b), 94 Stat. 1164, *reprinted in* 5 U.S.C. § 601 app., at 124 (Supp. IV 1980). This comment raises some interesting questions. Concerning the requirement that an analysis not be inconsistent with the "objectives of any rule," it may be that the RFA will seek to change the "objectives" of a rule if those objectives unnecessarily burden small entities; indeed, such change is the RFA's purpose. The probable meaning of the term is that the RFA cannot change any rule's objectives if they are mandated by underlying law. On the other hand, most regulatory "objectives" can be reconciled with the RFA by reading the term to apply to those objectives that can be met without inadvertently placing regulatory burdens on small entities.

Section 606 speaks only of sections 603 and 604 not altering applicable agency standards. This formulation presumably frees section 602 (the regulatory-agenda requirement) to suggest alterations in those standards.

198. 5 U.S.C. § 606 (Supp. IV 1980).

199. *Id.* §§ 603(c), 604(a).

200. Senator Culver's opening statement at the 1979 Regulatory Reform hearings noted "that it is not the purpose of these hearings or of S. 299 to undermine worthwhile Federal regulatory efforts." *1979 Senate RFA Hearings*, *supra* note 133, pt.3, at 2.

those in the health, safety, consumer, and environmental areas.[201] Thus, in such areas there was never a case made for giving small entities special treatment.

In some situations, however, it may be difficult to determine whether a particular regulatory alternative will frustrate substantive goals. For example, the use of exemptions from coverage, which is one of the IRFA alternatives listed in subsection 603(c)(4), has the potential to contradict underlying legislation. The legislative history recognizes, however, that there may indeed be situations in which exemptions are impermissible.[202] That one or more alternatives are impermissible does not necessarily mean that the regulatory-analysis process is unnecessary; rather, as long as some alternative (whether or not it is listed in Section 603(c)) is feasible or permissible, the agency should follow the IRFA process. Because it is difficult to believe that every alternative is impermissible, an agency would be hard pressed ever to dispense with the IRFA process.

The one exception to this generalization may occur in those agencies such as OSHA, in which cost-benefit analysis is either forbidden or clearly not required by Congress. The Supreme Court decided in *American Textile Manufacturers Institute, Inc. v. Donovan*[203] that Congress does not require a cost-benefit analysis when it speaks of establishing "feasible" standards for dealing with toxic materials;[204] therefore, courts may not mandate that agencies perform such analyses. This judicially sanctioned freedom from a cost-benefit analysis may appear to liberate agencies from the preparation of regulatory-flexibility and other analyses,[205] but this conclusion can be reached only by

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201. Senator Culver also stated, "It is not the aim of this legislation to allow the continuation of practices which are dangerous to workers, consumers or the environment." *Id.*

202. The discussion of S. 299 makes the point as follows:

> In some rare instances, the adoption of a flexible alternative may clearly be legally impermissible. If so, an agency may so indicate with a simple statement such as: "Under Section X of the Y Act, the agency is required to promulgate these rules in a uniform manner upon all members of the public;" or "Under the Supreme Court decision in X v. Y, no exceptions to this rule can be permitted;" or "Differing standards of compliance can be required only under circumstances described in Section A of the B Act, and those circumstances do not occur in this situation."

126 CONG. REC. S10,937 (daily ed. Aug. 6, 1980). *See also*, *1979 Senate RFA Hearings*, *supra* note 133, pt.3, at 3-11 (testimony of Peter Petkas).

203. 452 U.S. 490 (1981).

204. The *American Textile* case dealt with a challenge to OSHA's cotton dust inhalation standard promulgated pursuant to the agency's objectives set out in 29 U.S.C. § 655(b)(5) (1976).

205. These other analyses include, in particular, Executive Order 12,291, 46 Fed. Reg. 13,193, *reprinted in* 5 U.S.C. § 601 app., at 124 (Supp. IV 1980), which requires executive agencies to determine that the potential benefits to society of a regulatory action outweigh its potential costs before the agency takes action. See notes 231-35 *infra* and accompanying text. After the *American Textile* decision, executive agencies such as OSHA might not follow this requirement. If such

resorting to an unduly narrow reading of the regulatory-flexibility requirements. The RFA never mentions the term "cost-benefit" in describing the kinds of alternatives it seeks to have agencies consider. Moreover, it does not mandate any particular form of analysis or any given outcome. Therefore, the regulatory-flexibility-analysis process should be applicable even to those agencies such as OSHA that are congressionally freed from the use of cost-benefit analysis. Indeed, since OSHA itself has recently begun to employ concepts such as tiering in its promulgation of standards,[206] the implementation of the RFA process should not be difficult. A sensible approach to the regulatory-flexibility-analysis process is for agencies uniformly to prepare an IRFA listing all possible significant alternatives and then to use the comment period to focus on objections to particular alternatives from both legislative and feasibility viewpoints. These objections can be articulated in the FRFA as reasons for rejection of a particular significant alternative.

2. *The Analytical Techniques Required or Encouraged by the RFA*. Agencies must use "regulatory analysis" in preparing the IRFA and FRFA, a term not self-explanatory. A variety of analytical techniques are available, some more burdensome than others, that would meet the RFA's analysis requirements. Regulatory analysis can be a code word for regulatory paralysis and the drafters were sensitive to the charge that the RFA itself would add another delaying mechanism to the administrative process.[207] Congress placed responsibility for com-

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agencies choose not to follow the mandate of Executive Order 12,291, the Court's decision protects them; indeed, one can read the decision as forbidding cost-benefit analysis by OSHA, thus preventing OSHA from complying with the Executive Order. In any event, the Executive Order's cost-benefit requirements do not extend to independent agencies, unless the RFA were interpreted to require cost-benefit analysis independent of the Executive Order (an interpretation that is not recommended here, but that the OMB may encourage). See notes 228-42 *infra* and accompanying text.

206. *1979 Senate RFA Hearings*, *supra* note 133, pt.3, at 189 (testimony of Eula Bingham: "For small businesses OSHA provides special consideration"). *See generally* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION'S IMPACT ON SMALL BUSINESS (1976).

207. The legislative history divides the problem of administrative efficiency into two considerations. The first objection concerns the costs to administrative efficiency of imposing yet another analysis requirement upon agencies. The RFA's drafters pointed to the limitations in the RFA to "a significant effect upon a substantial number of small entities," and noted that the goals of the RFA "can be met largely through attentiveness by rulemakers to the unique problems of smaller institutions." *See* 126 CONG. REC. S10,938 (daily ed. Aug. 6, 1980). The point of this latter observation is that the Senate did not believe there was a real data collection or analysis problem, but only a "lack of interest" by agencies that the RFA seeks to rectify.

The second objection based on administrative efficiency concerns the disruptive and dilatory potential of judicial review, see notes 268-83 *infra* and accompanying text. *See generally 1979 Senate RFA Hearings*, *supra* note 133, pt.3, at 5 (testimony of Peter Petkas).

pliance oversight in the Office of Advocacy to emphasize small business interests in government. The Office can be expected to demand much of the regulatory-analysis process, but this arrangement creates inherent tensions that will complicate the determination of acceptable analytical techniques.

Sections 603 and 604 of the RFA do not identify the analytical techniques an agency should use in discussing suggested regulatory alternatives, but section 607 provides an important guide: "In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable."[208] This provision and the related legislative history indicate that the agency is not to perform regulatory analyses that require extensive creation of new data or even elaborate reworking of existing data. Rather it appears that an agency is to rely on existing data, which may or may not be quantified, and on whatever additional data it receives during the comment process.[209] If the main problem the RFA seeks to overcome is an agency "lack of interest" in small entities,[210] then data collection is simply not the thrust of the statute.

This narrow view of the agency's data collection role has important budgetary consequences. The agency will not usually need to commission staff or outside consultants to produce studies on small entity impact, but should be able to incorporate the small entity impact issue into related studies.[211] This interpretation will surely please agencies, but it may have the opposite effect on the Office of Advocacy, which may envision more stringent regulatory-flexibility responsibilities.[212] Moreover, the OMB has circulated tentative regulatory-analysis guides that must also be considered.[213]

If the Office of Advocacy behaves as if compliance with the requirements of the RFA is the sole responsibility of agencies, it could

208. 5 U.S.C. § 607 (Supp. IV 1980).

209. The Senate section-by-section analysis of the RFA stated that with respect to section 607, "agencies are encouraged to make reasoned estimates or [*sic*] quantifiable and non-quantifiable effects of various proposals, basing such estimates upon experience and expertise of agency personnel and any other information made available to the agency by external sources." 126 CONG. REC. S10,942 (daily ed. Aug. 6, 1980).

210. See note 207 *supra*.

211. See note 209 *supra*. For a discussion of the question of relating the RFA process to other regulatory analysis requirements, see text accompanying notes 224-54 *infra*.

212. The Office of Advocacy can be expected to make its view known through the formulation of guidelines for the preparation of RFAs.

213. OFFICE OF MANAGEMENT AND BUDGET, INTERIM REGULATORY IMPACT ANALYSIS GUIDANCE (1981) [hereinafter cited as OMB GUIDELINES].

well establish guidelines that are more onerous than necessary. The temptation is undoubtedly present to postulate standards for creating an "ideal" IRFA and suggesting that those standards should be the norm.[214] For example, proposing economic modelling of industries affected by a rule subject to the RFA could result in costly studies by agencies that would consume most of the agency resources available for rulemaking generally.[215] Such standards would ultimately prove counterproductive[216] and confirm fears that the RFA will deal a sharp blow to administrative efficiency. An institutional outline or guide to the IRFA that accepts realistic limits on the requirements of agency data collection and organization would best serve the long-run interests of those supporting the RFA.

The OMB has not yet decided whether it intends to propose an official outline.[217] To date, the OMB approach has simply been to provide an interim outline of the regulatory-impact analysis required under Executive Order 12,291[218] and to ask agencies to suggest improvements and ways in which the RFA requirements may be incorporated into the Executive Order.[219] Thus, the OMB will probably push the RFA process in the direction of the Executive Order regulatory-impact analysis over which the OMB has jurisdiction. What difficulties, if any, will emerge from this approach are not yet clear. One concern is whether agency compliance will require a thorough cost-benefit analysis, which does not seem to be called for under the RFA. This approach could cause a problem if agencies are not required or even permitted to conduct such analyses.[220]

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214. Bureaucratic behavior that seeks to maximize the agency's own particular role is understandable but especially mischievous when one bureaucracy oversees another. In this case, the RFA gives the Office of Advocacy a unique role in emphasizing compliance by rulemaking agencies, a role that can easily be overemphasized.

215. It is possible that the SBA will have already collected some data on industry behavior that would be of use to agencies making industry-specific evaluations through the SBA's codes. However, agencies are also called upon to make impact studies of small organizations and small governmental jurisdictions in situations in which there is no data base comparable to that available through the SBA.

216. Burdensome RFA performance standards would become counterproductive because they would be likely to encourage agencies to opt out of the RFA through the certification process rather than attempt compliance with the IRFA requirements. See text accompanying notes 170-71 *supra*.

217. OMB is still circulating a helpful but succinct outline of the IRFA prepared during the closing days of the Carter administration. *See* OMB INTERIM GUIDANCE, *supra* note 184.

218. 46 Fed. Reg. 13,193, *reprinted in* 5 U.S.C app. § 601, at 124 (Supp. IV 1980).

219. Letter from James C. Miller III, Administrator for Information and Regulatory Affairs, OMB, to agency heads (June 12, 1981). For a discussion of the interaction between the Executive Order and the RFA, see notes 228-42 *infra* and accompanying text.

220. See notes 203-05 *supra* and accompanying text. The ultimate reach of cases like *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981), is not yet clear. The Court was not faced

Some agencies have prepared their own RFA regulatory-flexibility guidelines. The FDA, for example, published a useful guide for its regulation writers and developers when the RFA became effective on January 1, 1981.[221] The guide discusses the RFA and related executive orders and outlines various regulatory alternatives (such as tiering, exemptions, and performance standards) that may be useful in preparing regulatory-flexibility analyses.[222] The FDA guide does not discuss a format for the preparation of an IRFA or FRFA, but it does recommend a procedure for advance notice of proposed rulemaking. This allows early collection of information about a proposed rule, including how the rule will affect small business.[223]

At this stage, an agency can experiment with the preparation of IRFAs and still be within the broad outlines of the RFA. It may be that guidelines proposed by the Office of Advocacy or by the OMB will ultimately limit agency experimentation, but there is little evidence that Congress intended the IRFA to become an analytical straightjacket. Section 603 is a clearly expressed provision and it should not pose difficulties for agencies that have personnel with the appropriate analytical skills. Discussion of the significant alternatives will require care and creativity, but there are no unfamiliar concepts to consider. Experience with the process, coupled with a good faith effort to comply, should allow agencies to create satisfactory, if not ideal, regulatory-flexibility analyses.

3. *The RFA's Relationship to Executive Order 12,291 and to the Paperwork Reduction Act.* Section 605(a) of the RFA emphasizes the avoidance of duplicative or unnecessary analyses: "Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the

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with the question whether OSHA may voluntarily engage in cost-benefit analysis. Therefore, OSHA, as an executive agency, may perform the cost-benefit analyses called for by Executive Order 12,291. But a future litigant will in all likelihood call attention to the Court's language in *American Textile* that in passing the RFA, Congress had already balanced the costs and benefits and did not expect the agency to do so again. *See id.* at 519-22. If this argument succeeds, the Executive Order's requirements could not be imposed and the only regulatory analysis that could operate would be that provided for under the RFA. The Director of OSHA, Thorne G. Auchter, has already indicated that his agency will drop plans to apply cost-benefit analysis. N. Y. Times, July 13, 1981, § A, at 11.

221. *See* FOOD AND DRUG ADMINISTRATION, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, FLEXIBLE REGULATORY ALTERNATIVES: A GUIDE FOR FDA MANAGERS, REGULATION WRITERS AND DEVELOPERS (1981).

222. *Id.* 3-6.

223. *Id.* 8.

provisions of such sections."[224] Section 605(c) complements this approach by allowing agencies to combine related rules for purposes of analysis: "In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of sections 602, 603, 604 and 610 of this title."[225] The obvious intent of these provisions is to encourage administrative efficiency in the preparation of regulatory analyses. There are numerous opportunities for integrating regulatory-flexibility requirements into existing regulatory analyses. Many agencies, as a matter of common sense, focus on regulatory alternatives during rulemaking; achieving the proper fit between the regulation and the regulated (the RFA principle) is not a new idea. In other situations, Congress specifically encourages agencies to undertake analyses when small businesses are involved, and with only slight modifications this same analysis could satisfy the IRFA requirements.[226] Furthermore, the collection and organization of existing data may be adequate to satisfy the RFA requirements. In addition to congressionally mandated analyses, the requirements imposed by Executive Order 12,291 and the Paperwork Reduction Act[227] can also be integrated into the RFA process.

(a) *The RFA and Executive Order 12,291.* Executive Order 12,291, issued by President Reagan on February 17, 1981,[228] is designed to minimize duplication and conflict of regulations and to ensure well-reasoned regulations. Much like the RFA, the Executive Order requires a regulatory-impact analysis that lists regulatory alternatives, but it departs from the RFA in that it applies only to "major rules"[229] issued by executive agencies.[230] Unlike the RFA, it emphasizes cost-benefit analysis.[231] The Executive Order is more emphatic than the RFA, instructing agencies not to promulgate rules unless the potential benefits to society outweigh the potential costs. On

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224. 5 U.S.C. § 605(a) (Supp. IV 1980).

225. *Id.* § 605(c).

226. In FTC rulemaking, for example, the Commission is required to publish an advance notice of rulemaking that discusses "possible regulatory alternatives." 15 U.S.C. § 57a(b)(2)(A) (Supp. IV 1980). When the Commission promulgates a rule, the statement of basis and purpose must contain "a statement as to the economic effect of the rule, taking into account the effect on small business and consumers." *Id.* § 57(a)(d)(1).

227. 44 U.S.C.A §§ 3501-3520 (West Supp. 1981).

228. 46 Fed. Reg. 13,193 (1981), *reprinted in* 5 U.S.C. app. § 601, at 124 (Supp. IV 1980).

229. Major rules are defined as those likely to result in "[a]n annual effect on the economy of $100 million or more." *Id.* 1(b)(1). In addition, the Director of the OMB is granted the authority to prescribe further criteria for defining a major rule, *id.* § 3(b), and may actually designate a rule as major. *Id.* §§ 3(b), 6(a)(1).

230. *See id.* § 1(d).

231. *Id.* § 2.

the other hand, the RFA permits any regulatory outcome so long as the alternatives are rejected after reasoned consideration.

Frequently, regulatory-impact analysis and regulatory-flexibility analysis will both be applicable to a proposed rule.[232] The RFA and the Executive Order contemplate such overlaps and urge that the analyses be combined.[233] In each case a two-stage analysis, including a preliminary and final step, is contemplated.[234] The cost-benefit approach of the Executive Order may also constitute a "significant alternative" for purposes of IRFA analysis unless that approach is forbidden by organic legislation.[235]

Complications arise when an agency must submit its preliminary or initial analyses for review. Under the RFA, all IRFAs must be transmitted to the Office of Advocacy, but that Office has no direct role in the rulemaking process.[236] Under the Executive Order, the preliminary and final regulatory impact analyses must be submitted to the Director of the OMB for review.[237] The agency must then consult with

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232. The definition of "rule" is broader under Executive Order 12,291 than it is under the RFA. The Executive Order does not tie the definition directly to the APA and it covers interpretative rules that the RFA definition excludes. *Compare id.* § 1(a) *with* 5 U.S.C. § 601(2) (Supp. IV. 1980). See notes 154-61 *supra* and accompanying text. Also, the Executive Order directs that a final regulatory-impact analysis be prepared for those rules that are not emergency rules and for which no notice of rulemaking has been published. Exec. Order No. 12,291, § 3(c)(1), 46 Fed. Reg. 13,193 (1981), *reprinted in* 5 U.S.C. § 601 app., at 124 (Supp. IV 1980).

233. *See*. 5 U.S.C. § 605 (Supp. IV 1980); Exec. Order No. 12,291, § 3(a), 46 Fed. Reg. 13,193 (1981), *reprinted in* 5 U.S.C. § 601 app., at 124 (Supp. IV 1980).

234. These are called a preliminary and final regulatory impact analysis under the Order and an IRFA and FRFA under the RFA.

235. See notes 197-202 *supra* and accompanying text. The Executive Order specifies that each preliminary and final analysis contain the following information:

> (1) A description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits;
>
> (2) A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs;
>
> (3) A determination of the potential net benefits of the rule, including an evaluation of effects that cannot be quantified in monetary terms;
>
> (4) A description of alternative approaches that could substantially achieve the same regulatory goal at lower cost, together with an analysis of this potential benefit and costs and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted; and
>
> (5) Unless covered by the description required under paragraph (4) of this subsection, an explanation of any legal reasons why the rule cannot be based on the requirements set forth in Section 2 of this Order.

Exec. Order No. 12,291, § 3(d)(1)-(5), 46 Fed. Reg. 13,194 (1981), *reprinted in* 5 U.S.C. § 601 app., at 124-25 (Supp. IV 1980).

236. *See* 5 U.S.C. § 603 (Supp. IV 1980). The FRFA need not be submitted to the Office of Advocacy. *See id.* § 604.

237. To allow the Director to conduct this review, an agency must submit the preliminary analysis sixty days before publication of the notice of proposed rulemaking and the final analysis thirty days before promulgation of the final rule. Exec. Order No. 12,291 § 3(c), 46 Fed. Reg.

the Director and refrain from publishing its notice or promulgating its final rule, as the case may be, during the consultation process.[238] The Executive Order stops short of forbidding publication or promulgation if the consultation process is unsuccessful, but it obviously contemplates a much more direct coordination role for the OMB than does the RFA for the Office of Advocacy. Assuming a rule is subject to both analyses, there is no apparent way to avoid the OMB consultation process for RFA rules unless legislation declares to the contrary, either directly or by establishing time limits on rule promulgation.[239]

The Executive Order process clearly dominates when rules are subject both to regulatory analysis under the Executive Order and to regulatory-flexibility requirements under the RFA. The RFA process will operate freely only in those rulemaking circumstances in which the Executive Order does not apply. These circumstances include all independent agency rulemaking and any executive agency rulemaking that involves rules having an impact of less than $100 million on the economy,[240] a category into which a large number of rules will fall.[241] The Office of Advocacy is well advised to consolidate its oversight resources over these rules and leave the other rules to the OMB to review under the Executive Order, unless there are strong pro-small-business reasons for joining in the OMB's review process.[242]

(b) *The RFA and the Paperwork Reduction Act.* The Paperwork Reduction Act of 1980,[243] designed with small business specifically in mind, establishes standards for the review and reduction of reporting and paperwork requirements.[244] It gives the OMB, through the newly created Office of Information and Regulatory Affairs (OIRA), responsi-

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13,194-95 (1981), *reprinted in* 5 U.S.C. § 601 app., at 124-25 (Supp. IV 1980). Even if it is not "major," each rule must be submitted to the Director at least ten days before publication and promulgation, respectively. *Id.* § 3(c)(3).

238. Exec. Order No. 12,291, § 3(f)(1) - (2), 46 Fed. Reg. 13,195 (1981), *reprinted in* 5 U.S.C. app. § 601 app., at 125 (Supp. IV 1980).

239. The Executive Order states that it does not apply when its deadlines conflict with deadlines imposed by statute or judicial order. *Id.* § 8(2).

240. *See id.* § 1(b)(1).

241. Independent agencies such as the SEC, the FTC, the ICC and the Consumer Product Safety Commission issue many regulations that concern small business. The $100 million threshold for Executive Order regulations excludes from coverage executive agency regulations that probably number in the thousands.

242. One can foresee the OMB's willingness to allow the Office of Advocacy to take the lead concerning regulations that exceed $100 million if the regulations have a significant impact on small business and if the OMB and the Office of Advocacy have a good working relationship.

243. 44 U.S.C.A. §§ 3501-3520 (West Supp. 1980).

244. The first purpose of the Act is "to minimize the Federal Paperwork burden for individuals, *small businesses*, State and local governments, and other persons." *Id.* § 3501(1) (emphasis added). *See also* WHITE HOUSE COMM'N, *supra* note 24, at 29 (calling for the elimination of onerous reporting requirements).

bility for review of the information policies of independent and executive agencies and mandates a reduction in federal paperwork by October, 1983.[245]

The Act imposes several duties on agencies and on the OMB with regard to rulemaking. At the time the notice of a proposed rulemaking is published, agencies must forward to the OIRA copies of all proposed rules that require collection of information.[246] Within sixty days after receipt of these rules, the OIRA may file public comments on the rules' information-collection requirements and the agency must respond to these comments in its final rule. Within sixty days of the publication of the final rule, the OMB (through the OIRA) may disapprove any collection of information it deems unreasonable.[247]

The OMB's control over agency rulemaking under the Paperwork Reduction Act could affect rulemaking proceedings that are also subject to the RFA. The Office of Advocacy may have to coordinate its regulatory-flexibility function with the OMB when the Paperwork Reduction Act applies.[248] Undoubtedly there will be circumstances in which the Office of Advocacy will respond to information-collection regulations by recommending alternatives which exempt small entities or reduce the collection burden such entities would otherwise bear. In these circumstances, the Office of Advocacy has an ally in the OMB and the Paperwork Reduction Act. However, there will be an inevitable shift of agency attention away from the RFA under these circumstances because the OMB generally has a stronger influence on agency behavior.[249]

One important purpose of the Paperwork Reduction Act is to serve through the Federal Information Locater System as a collector of information about reporting requirements.[250] This system, to be maintained by the OIRA, is to collect and to index agency requests for data collection and is thus to facilitate the cooperative exchange of data among agencies and the reduction of requests for new data.[251] This capability

245. *See* 44 U.S.C.A. §§ 3504, 3505 (West Supp. 1981).

246. *Id.* § 3504(h)(1)-(5).

247. *Id.* § 3507(b). An independent agency may overrule OMB disapproval of its information-collection request by a majority vote of its members. *Id.* at § 3507(c).

248. Because the Paperwork Reduction Act reaches independent agencies it may have a greater overlap with the RFA than does Executive Order 12,291.

249. Under the Paperwork Reduction Act, OMB reports to Congress about agencies which violate the Act. 44 U.S.C.A. § 3514(a)(7) (West Supp. 1980). This reporting function is similar to the Office of Advocacy's annual report to the President and Congress under the RFA. *See* 5 U.S.C. § 612(a) (Supp. IV 1980).

250. *See* 44 U.S.C.A § 3511 (West Supp. 1980).

251. Before seeking information, agencies must check with OMB to determine if the data, or substantially similar data, already exists in the system. *See id.* §§ 3508-3510.

should be of use to the Office of Advocacy in its monitoring of agency rulemaking because one of the purposes of IRFA is to identify duplicative federal rules and reporting requirements.[252] In effect, the OIRA will collect useful information that will assist both the Office of Advocacy and the agencies themselves in complying with the RFA requirements.

The interaction of the RFA, the Paperwork Reduction Act, and Executive Order 12,291 may sound harmonious in theory, but there is real potential for delay and confusion in practice. Agencies may find themselves with three new directives to consider before publishing proposed rules for comment,[253] a situation that would considerably delay the rulemaking process (perhaps this is one of the unarticulated purposes of regulatory analysis)[254] and that would require agencies to develop special expertise in juggling the various new demands on the rulemaking process.

E. *Reviewing Existing Rules and Establishing Agendas.*

The RFA imposes two further responsibilities on agencies that promulgate rules. Under section 602 an agency must establish regulatory-flexibility agendas, to be published semiannually in the *Federal Register*,[255] and under section 610 it must publish and implement a plan for reviewing the impact of existing rules on small entities. The rules covered are those likely to have a significant economic impact on a substantial number of small entities. Each rule must be summarized and given a timetable according to which action on the rule will be completed.[256] The agenda goes to the Office of Advocacy for comment and is available for review by small entities or their representatives. The purpose of the agenda is to provide small entities with another kind of early warning system.[257] It does not, however, bind an agency

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252. *See* 5 U.S.C. § 603(b)(4)-(5) (Supp. IV 1980).

253. The Appendix contains a chart showing how the requirements of the RFA, the Executive Order, and the Paperwork Reduction Act interact.

254. On the advisability of "slowing the regulatory process to a crawl" as a means of deregulation, *see* Eads, *supra* note 60, at 26.

255. 5 U.S.C. § 602(a) (Supp. IV 1980). The RFA does not specify any particular dates within these months because of the need to coordinate publication submission dates with the Office of the *Federal Register*. *See* OMB INTERIM GUIDANCE, *supra* note 184. For a good example of a regulatory agenda incorporating section 602 requirements with those of other regulatory agendas, see 46 Fed. Reg. 53,990 (1981) (EPA Regulatory Agenda).

256. 5 U.S.C. § 602(a) (Supp. IV 1980). This timetable applies only to those rules that have been subject to a notice of proposed rulemaking. The Senate analysis makes clear that the agenda does not force agencies to announce rulemaking proceedings that are still in the planning stage. 126 CONG. REC. S10,941 (daily ed. Aug. 6, 1980).

257. *See* 126 CONG. REC. S10,941 (daily ed. Aug. 6, 1980).

to make future determinations in accordance with its terms.[258]

Executive Order 12,291 also requires the publication of a regulatory agenda, which may be incorporated into the RFA section 602 agenda.[259] The substantive requirements of the Executive Order agenda are phrased in language similar to that of the RFA, except that the former is directed at major rules rather than at rules having a significant economic impact.[260] The intent of the Executive Order is to avoid duplication by coordinating its requirements as neatly as possible with those of the RFA. The Executive Order does, however, add the requirement that existing regulations be reviewed in its agenda, a subject the RFA treats separately.[261]

The RFA's plan for reviewing existing rules is a basic part of its goal of reducing the burden of regulation on small entities. The plan works on the sensible assumption that much burdensome regulation is already in effect and it seeks to have agencies systematically review such regulations under an established schedule. The agency must publish the review plan within 180 days after the effective date of the RFA — July 1, 1981 — and the plan must provide for a review every ten years.[262] Review of existing rules imposes an enormous administrative burden on the responsible agency, for the agency must first review all of its rules to determine whether the rules have a significant economic impact on a substantial number of small entities, a complex determination in itself. Then the agency must assess the following:

> (1) the continued need for the rule;
>
> (2) the nature of complaints or comments received concerning the rule from the public;
>
> (3) the complexity of the rule;
>
> (4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and
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> (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.[263]

These factors, similar to those listed in an earlier Executive Order

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258. *See* 5 U.S.C. § 602(d) (Supp. IV 1980).

259. Exec. Order No. 12,291, § 5(a), 46 Fed. Reg. 13,193, 13,195 (1981), *reprinted in* 5 U.S.C. § 601 app., at 125 (Supp. IV 1980).

260. See notes 229-30 *supra* and accompanying text. The similar phraseology suggests the drafters of the Executive Order borrowed their language from the RFA.

261. Exec. Order No. 12,291, § 5(a)(3), 46 Fed. Reg. 13,193, 13,195 (1981), *reprinted in* 5 U.S.C. § 601 app., at 125 (Supp. IV 1980).

262. This period can be expanded annually, on notice, for an additional five years. 5 U.S.C. § 610(a) (Supp. IV 1980).

263. *Id.* § 610(b)(1)-(5).

issued by President Carter,[264] are described in the legislative history of the RFA as non-burdensome because of their familiarity.[265] Obviously, however, this review process will require a great deal of agency effort, which implies that the real purpose of this burden is to keep an agency from doing anything but reviewing rules.[266]

Despite its list of factors, the RFA does not aid agencies in setting priorities for reviewing rules. Given the burden on an agency to conduct the review in the first place, it is important to establish some method whereby the rules most burdensome on small entities are considered first. One approach is to use the factors themselves to establish priorities.[267] For example, the complaints received about a rule may indicate what burdens that rule imposes. An agency can refine complaint data, analyzing the complaint by type and characteristics, and develop a coefficient of regulatory burden for each of its existing rules. An agency that sets review priorities based on an analysis of complaints may be operating more efficiently than other agencies even if it reviews fewer existing regulations.

F. *The Role of Judicial Review.*

The RFA contains an extremely qualified and ambiguous provision for judicial review; yet, much of the RFA's enforcement potential depends on the interpretation of this provision. Section 611 provides:

> (a) Except as otherwise provided in subsection (b), any determination by an agency concerning the applicability of any of the provisions of this chapter to any action of the agency shall not be subject to judicial review.
>
> (b) Any regulatory flexibility analysis prepared under sections 603 and 604 of this title and the compliance or noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review. When an action for judicial review of a rule is instituted, any regulatory flexibility analysis for such rule shall constitute part of the whole record of agency action in connection with the review.
>
> (c) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judi-

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264. Exec. Order No. 12,044, 3 C.F.R. 671 (1978), *revoked by* Exec. Order No. 12,291, 46 Fed. Reg. 13,193, *reprinted in* 5 U.S.C. § 601 app., at 124 (Supp. IV 1980).

265. *See* 126 CONG. REC. S10,942 (daily ed. Aug. 6, 1980).

266. Consider the requirement that a rule be reviewed to determine conflict or overlap with federal, state, and local rules. There are few existing guides to detect current conflicts between federal regulations (indeed the Code of Federal Regulation still lacks a comprehensive index) and no guides helpful for comparing state and local rules, which are not even published in many cases.

267. Executive Order 12,044 also adds some useful criteria for setting review priorities, such as burdens imposed by the rule and the need for clarifying language. *See* 3 C.F.R. 674 (1978), *revoked by* Exec. Order 12,291, 46 Fed Reg. 13,193 (1981), *reprinted in* 5 U.S.C. § 601 app., at 124 (Supp. IV 1980).

> cial review of such statement or analysis is otherwise provided by law.[268]

On its face, this provision seems more like a statement of non-reviewability than of reviewability, but by including the IRFA and the FRFA as part of the whole record it obviously contemplates some manner of judicial review of the RFA process. The purpose of this provision can be best understood by an examination of the relevant legislative history.

1. *Legislative Background.* Section 611(a) is a clear non-reviewability provision for actions under the RFA other than the regulatory-flexibility analyses of sections 603 and 604. Thus, the following are beyond judicial scrutiny: an agency decision under section 605(b) to certify a rule as not having a significant economic impact on a substantial number of small entities; agency actions under sections 602 and 610 concerning the regulatory agenda or periodic review of existing rules; or any procedural decisions under sections 608 and 609.[269] This is the clear import of section 611(a) and the relevant legislative reports.[270] In effect, Congress subordinated the value of compliance induced by judicial oversight to the values of administrative efficiency and uninterrupted decisionmaking.[271] Even though the non-reviewability of the certification process may frustrate the RFA's purpose, Congress chose to take this risk rather than embroil the process in the quagmire of litigation.[272]

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268. 5 U.S.C. § 611 (Supp. IV 1980).

269. In emergency circumstances, § 608 provides for waiver of an IRFA and for delay of a FRFA for up to 180 days. The rule concerns lapses if the FRFA is not completed by then, but § 611(a) apparently bars judicial enforcement of this "lapse." Section 609 establishes procedures for gathering comments from small entities.

270. The Senate section-by-section analysis of S. 299 states:

> Section 611(a) provides that there is no judicial review of any determination by an agency regarding the applicability of any provision of this subchapter except as provided in Section 611(b). This means, for example, that the decision by an agency with respect to what proposed rules would have a significant economic impact on a substantial number of small entities pursuant to Section 605(b) shall not be subject to judicial review. Thus, the decision regarding when the agency shall conduct a regulatory flexibility analysis remains in the sole discretion of the agency. Also not subject to judicial review are agency determinations regarding the agenda (section 602), the procedures for gathering comments (section 609), the periodic review of rules (section 610) and any other administrative determinations under this act.

126 CONG. REC. S10,942-43 (daily ed. Aug. 6, 1980).

271. In the Senate discussion, the judicial review (or non-review) provision is addressed as a solution to the perceived problem of "increased litigation" and "undue delay." *See id.* S10,937.

272. In one respect the certification process does hint at some judicial oversight. If an agency improperly uses the certification process (as determined by the Office of Advocacy) and later promulgates a rule, one can argue that the rule will lapse in 180 days for failure to supply a FRFA, per § 608(b). There is a question, however, who can raise this "lapse" and in what forum. Judicial review seems inappropriate because of § 611(a). Apparently, Congress did not envision judicial review as the method to police improper certifications or improper emergency determina-

Section 611(c) simply declares the obvious: nothing stated about judicial review in the RFA is intended to affect review of any impact statement mandated by other law.[273] This provision is not discussed in any detail in the legislative reports, but Congress apparently perceived the possibility that combining regulatory-flexibility analyses with other analyses (such as the regulatory-impact analysis required by Executive Order 12,291) might unintentionally lead to a change in the standards of judicial review.[274] Because the subsection is only a cautionary one, however, it has no real bearing on the question of the role of the courts under the RFA. The subsection that raises that question is 611(b).

Section 611 emerged late in the legislative process. Senate bill S. 299 contained no specific judicial-review provision when it was introduced into the Senate in the Ninety-sixth Congress and reported out of the Judiciary Committee on May 5, 1980.[275] That version had grafted the substantive provisions of the RFA into the APA, primarily section 553 of the APA. As a result of failing to mention judicial review at this point, the Senate recognized that the judicial-review provisions of the APA would apply to review under the RFA amendments: "The bill does nothing to alter the right of review of agency action as outlined in 5 U.S.C. § 702."[276] When the bill went to the Senate floor for passage, however, the RFA was recodified as a separate section of the APA, acquiring section 611.

The Senate believed it was achieving a balance between the non-reviewability provisions of related legislation[277] and the full reviewability of the APA by adding section 611:

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tions. See note 269 *supra*. In effect, the policing mechanism is the Office of Advocacy's annual reports to the President and to Congress.

273. *See* 5 U.S.C. § 611(c) (Supp. IV 1980).

274. President Carter's Executive Order 12,044, 3 C.F.R. 671 (1978), *revoked by* Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981), *reprinted in* 5 U.S.C. § 601 app., at 124 (Supp. IV 1980), contained an explicit provision barring judicial review of its regulatory analyses. President Reagan's Executive Order 12,291, 46 Fed. Reg. 13,193 (1981), *reprinted in* 5 U.S.C. § 601 app., at 124 (Supp. IV 1980), contains a judicial review provision that is equally as ambiguous as that in § 611(b) of the RFA:

> This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person. The determinations made by agencies under Section 4 of this Order, and any Regulatory Impact Analyses for any rule, shall be made part of the whole record of agency action in connection with the rule.

Id. § 9. Because this provision is similar to § 611, any judicial interpretations it receives will bear upon § 611.

275. *See* S. 299, *supra* note 83.

276. S. REP. No. 878, 96th Cong., 2d Sess. 9 (1980) accompanying S. 299.

277. *See* S. 262, 96th Cong., 1st Sess. § 607, 125 CONG. REC. S861 (daily ed. Jan. 31, 1979); S. 755, § 603 96th Cong., 1st Sess. § 603, 125 CONG. REC. S3338 (daily ed. Mar. 26, 1979) (the Senate and Carter Administration omnibus regulatory-reform bills).

> [T]he bill strikes a balance between two central aims with regard to the role of the courts. The first is to insure that an agency's compliance with the objectives of this bill be subject to meaningful, yet responsibly defined, judicial oversight. A flat prohibition of any such oversight might give the erroneous impression that regulatory flexibility provisions may be ignored with impunity . . . .
>
> On the other hand, the bill avoids the substantial disruption of agency rulemaking inherent in allowing separate judicial review of the regulatory flexibility analysis itself . . . .[278]

This balance was partially the result of the Senate's belief that to try to prevent a reviewing court from examining the regulatory-flexibility analysis would be "unrealistic."[279] The most satisfactory compromise, therefore, was to permit a court to consider the final regulatory-flexibility analysis as part of the whole rulemaking record, yet not to allow the FRFA to be the separate subject of judicial review. This compromise is ambiguous, however. Forbidding "separate judicial review" can be read to mean forbidding not only interlocutory review but also "separate" review of the FRFA as part of the evaluation of the underlying rule.

2. *Problems of Interpretation*. Apparently the FRFA exists for the court to read, but not to evaluate, a difficult distinction for any reviewing tribunal to draw. If the FRFA is so poor as to be worthless, or is prepared manifestly in bad faith, is a reviewing court to ignore challenges to the FRFA's validity when they are pressed by the Chief Counsel for Advocacy? In those circumstances many judges would be tempted to conclude that they are empowered to hold the FRFA as well as the resulting rule arbitrary and capricious. But if the court is not reviewing the FRFA in the first place, then any weakness in the FRFA should be irrelevant to the decision whether to uphold or overturn the rule to which the FRFA relates.[280] Under this view, the FRFA will be

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278. 126 CONG. REC. S10,939 (daily ed. Aug. 6, 1980).

279. *Id.* The Senate may have been mindful of the earlier testimony of the late Judge Harold Leventhal (in connection with S. 262 and S. 755) on the court's role in considering "non-reviewable" analyses, as of the Clean Air Act Amendments, 42 U.S.C. § 7617 (Supp. III 1979), to which Judge Leventhal referred. Judge Leventhal took the position that the reviewing court should consider any documents or analyses in the record that help it determine whether the rule itself is a valid exercise of administrative power. *See 1979 Senate RFA Hearings*, *supra* note 133, pt. 1, at 6-23.

280. In an exchange with Judge Leventhal during the hearings on the RFA, Senator Culver asked the following question: "If an agency, for example, stated that it relied on an impact analysis and the analysis was, in the judgment of the court, viewed to be arbitrary or capricious, could the rule itself then not be considered to be arbitrary and capricious?" The Judge replied as follows: "I think that the function of the regulatory analysis in that case would only be to indicate what the agency meant in its rule and what the agency was doing in its rule." *1979 Senate RFA Hearings*, *supra* note 133, pt. 1, at 14.

of assistance to the court in determining the meaning of the rule, but it should not itself lead to an overturning of the rule.[281]

The legislative history does not fully endorse this narrow view of the role of judicial review. Both the Senate and the House discussions indicate that failure to complete a FRFA, or preparing it inadequately or in bad faith "would be grounds for finding the rule unreasonable under established case law."[282] This interpretation conflicts with the idea that the regulatory analysis is to be used only as a supplement to the record, not as the subject of independent judicial review. Furthermore, the court is in a conceptual bind in determining whether the agency performed the FRFA inadequately or in bad faith. The standards for judging regulatory analyses are hardly well established and the regulatory-analysis process itself is experimental.

Thus, the legislative history raises the twin possibilities that section 611(b) may serve either as an independent ground for reviewing the adequacy of the FRFA or only as an additional basis for review of the underlying rule. It may not be necessary in the usual case, however, to determine which possibility is correct, for in many situations poor performance in the preparation of a FRFA will carry over to inadequate preparation of the rule itself. Moreover, poor performance on the

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281. This seems to be the view Judge Leventhal expressed. See notes 279-80 *supra*. On the other hand, a sloppy or manifestly inadequate FRFA may indicate to the court that the rule itself has not been adequately prepared. Judge McGowan has suggested that the presence of a regulatory analysis in the record may affect the court's judgment about the rule's validity, either positively or negatively, depending on the quality of the analysis. *See* Address by C. McGowan, American Ass'n of Law Schools Conference (Jan. 4, 1981).

282. The Senate section-by-section analysis containing that conclusion reads as follows:

> For example, in the unlikely event that following an agency head's decision not to certify that a particular rule will have no significant economic impact on a substantial number of small entities (pursuant to Section 605(b)), the agency then completely ignores the resulting requirement to perform regulatory flexibility analyses, an injured party would have grounds to argue that this fact is evidence of the unreasonableness of the rule. Similarly if it can be demonstrated that a regulatory flexibility analysis has not been prepared in good faith and the agency therefore is unable to provide substantive grounds supporting the final rule in the statement of basis and purpose, the court would have grounds to invalidate the rule. In addition, if an agency completely fails to respond to a clearly available significant alternative to the rule less burdensome on small entities and raised in public comments, then this failure would be grounds for finding the rule unreasonable under established case law. *See Portland Cement v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied* 417 U. S. 921 (1978); and *Automotive Parts and Accessories v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968); *see also Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 849-50 (D.C. Cir. 1972).

126 CONG. REC. S10,939 (daily ed. Aug. 6, 1980).

> In the House the following exchange on judicial review under S. 299 took place:
>
> MR. BROOMFIELD. But what if the agency fails to do this analysis, or if the analysis is inadequate, sloppy or incomplete?
>
> MR. McDADE. Let me say unequivocally as a member of the committee that wrote this bill, that in that instance, upon review of the final regulation, it is the intent of our committee that the court should strike down the regulation.

126 CONG. REC. H8463 (daily ed. Sept. 8, 1980). Mr. McDade was a member of the committee that drafted H.R. 4660, not S. 299.

FRFA will undoubtedly color the court's view of the rule in question. Should poor (or pro-forma) FRFA performance, however, not be reflected in the preparation of the underlying rule,[283] the courts should then rely on the underlying policies of the RFA to determine the appropriate scope of judicial review. Ardent supporters of the RFA will prefer broader, more liberal judicial review, which by its nature will improve chances of agency compliance with the RFA's analysis requirements. The RFA, however, is not designed to trigger judicial intervention in the usual sense, for it does not adopt the APA judicial review provisions. The most that can be said is that in designing the judicial review provisions of the RFA, some members of Congress believed that in egregious cases of noncompliance the courts should intervene on review of the underlying rule. That belief may convince a reviewing court occasionally to assert itself in the RFA compliance process.

G. *The Role of the Office of Advocacy.*

The ultimate success of the RFA rests on the shoulders of the Chief Counsel for Advocacy. Section 612 requires the Chief Counsel to monitor agency compliance with the RFA and to submit compliance reports at least annually to the President and to Congress.[284] This section also grants the Chief Counsel the right to intervene in any rulemaking review proceeding to present his views on the effect of the proposed rule on small entities, and requires agencies to report many of their activities to the Chief Counsel. Because the RFA does not rely on judicial enforcement by private parties, the Chief Counsel is in effect the sole policeman. It is a complex role with many pitfalls, most of which can be avoided by a person with keen political instincts.

1. *The Chief Counsel's Monitoring Role.* Under the RFA the Chief Counsel receives the regulatory-flexibility agendas,[285] initial regulatory-flexibility analyses,[286] and certifications declaring the inapplicability of the RFA.[287] Because these reports will inundate the Office of Advocacy, the Chief Counsel must effectively monitor them to im-

283. See note 282 *supra*. It is not difficult to conceive of a situation in which the FRFA was poorly done because the agency believed the small business concerns to be of marginal relevance to the underlying rule and not worth the effort at compliance which the Office of Advocacy might expect. At the same time the rule itself could be the product of careful analyses. Of course in this situation, the agency might be better advised to certify out of the RFA under § 605(b) rather than run the risk of jeopardizing the support of the rule on appeal through a poorly prepared FRFA.

284. 5 U.S.C. § 612 (Supp. IV 1980).

285. *See id.* § 602.

286. *See id.* § 603(a).

287. *See id.* § 603(b).

plement the goals of the RFA. Furthermore, because neither the agendas, the IRFA's, nor the certifications are subject to judicial review, the Chief Counsel creates the only incentives for compliance.

Because many governmental agencies are unfamiliar with the Office of Advocacy, its first step is to gain the attention of the affected agencies and then to turn that awareness into a credible force for compliance. Only an effective Chief Counsel and a dedicated staff, using all available persuasive tools, can produce the incentives for compliance. For example, periodic reports to the President and to Congress regarding the cooperation of individual agencies can form "winners and sinners" lists that may be influential in determining reappointments and budgets. Also, the Chief Counsel's willingness to intervene in rulemaking appeals from recalcitrant agencies should give the courts an awareness of particular problem areas.

2. *The Personnel Needs of the Office of Advocacy*. The most difficult problem for the Chief Counsel will be to assemble a staff large enough to undertake the monitoring process. When it passed the RFA, Congress estimated approximately five hundred rules a year would require regulatory-flexibility analysis.[288] That estimate appears to understate the actual workload, for even with the restraints on rulemaking imposed by the Reagan administration,[289] in the first seven months of the RFA's existence[290] the Office of Advocacy has noted about one thousand rules, for which the Office received about twenty IRFA's and approximately eight hundred certifications. In the period of July 1, 1981 to October 1, 1981, 412 out of the 489 RFA dispositions were certifications.[291] This apparent imbalance between certifications and IRFA's is a matter of concern, because as a practical matter the Office of Advocacy must concentrate on certifications as much as it does on IRFA's.

At present the Office has about twenty-five attorneys assigned to it[292] as well as approximately eight trained economists. The RFA does not increase this level of professional staffing, and given the current general cutback in federal manpower, it is unlikely that additional support will be forthcoming. As presently organized, the Office has nonprofessional intake personnel assigned to each agency or group of

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288. 126 CONG. REC. H8469 (daily ed. Sept. 8, 1980).

289. President Reagan froze the issuance of new regulations by executive agencies for the first three months of his term. Presidential Memorandum of January 29, 1981, 46 Fed. Reg. 11,227 (1981). Since then, the number of new regulations issued has dropped significantly. *See* Statment of Frank S. Swaim, *supra* note 171, at 57-59.

290. January 1, 1981 to July 31, 1981.

291. See note 283 *supra*.

292. *See* 15 U.S.C. § 634b-634d (1976 & Supp. IV 1980).

agencies that promulgates rules. These personnel collect certifications and IRFA's and scan the *Federal Register* for notices of proposed rules that may require agency action under the RFA.[293] But the review process requires professionals, especially with respect to the review of certifications.[294] Because the Office of Advocacy estimates that about seventy agencies promulgate rules that are potentially subject to the RFA, the Office with its limited staff should develop a priority list of the agencies that are of greatest concern to small entities and commit staff resources to their monitoring. As a practical matter, it may be necessary that the rules of some agencies go unreviewed if the Office is to do its job at all.

To assist the Office in its monitoring function, volunteers from the private sector can also be used to alert the staff to important rules.[295] Furthermore, the Office can turn for assistance in regulatory analyses to other government agencies, particularly to the OMB. But that alliance, although critical to resolving the staffing problems facing the Office of Advocacy, will require careful attention.

3. *The Office of Advocacy and the OMB.* The overlap in jurisdiction between the OMB, which monitors the Paperwork Reduction Act and Executive Order 12,291,[296] and the Chief Counsel may create disputes and confusion, but it can also serve as a source of mutual support. The OMB, through its Office of Information and Regulatory Affairs, is an established organization well trained to conduct regulatory analysis. It has historically asserted strong control over the agencies within its jurisdiction and certainly can be expected to assert itself in any working relationship involving Executive Order 12,291 and the

293. The Office of Advocacy has drafted internal guides for RFA monitoring to assist its staff. *See* OFFICE OF ADVOCACY, SMALL BUSINESS ADMINISTRATION, GUIDES TO REGULATORY FLEXIBILITY ANALYSIS MONITORING (Draft 1981) (on file with Duke Law Library).

294. The Chief Counsel for Advocacy has established a rule-review process with five components: monitoring the *Federal Register*; logging of rules potentially subject to the RFA; review of these rules by a professional staff member assigned to the particular agency; follow-up, as needed, and weekly assessment sessions by the Regulatory Flexibility Review Group. The Office is consistently exploring use of computer software that would be compatible with the OMB Reports Management System. *See* Statement of Frank S. Swaim, *supra* note 171, at 14-15.

295. The Office of Advocacy has already appointed a task force of volunteers to assist in the monitoring process. So far over 200 unpaid monitors, many of whom are attorneys who practice before the particular agencies involved, have been selected. Their role is primarily to serve as an early-warning system and as a source of substantive guidance for the Office of Advocacy professionals who are assigned to specific agencies. In addition, many agencies have established RFA officials as contact and resource persons. *See* GUIDES TO REGULATORY FLEXIBILITY ANALYSIS MONITORING, *supra* note 293, at 26-80 (on file with Duke Law Library).

296. See text accompanying notes 237-38 and 245-49 *supra*.

RFA.[297] The question is to what extent the Chief Counsel may rely on OMB assistance in performing the monitoring role under the RFA without yielding the decisional authority of the Office of Advocacy. Obviously coordination is necessary, for otherwise the basic message of regulatory reform sent by the last two administrations and by the RFA itself would be ignored. On the other hand, coordination tends to create bureaucratic rivalries. For example, the small business community, whose chosen representative is the Chief Counsel, may well have special interests that the OMB does not consider important. Moreover, because Congress has clearly placed responsibility for small entities in the hands of the Office of Advocacy, the Office is unlikely to tolerate excessive OMB control. Because Congress and the President clearly want to minimize the burden of regulatory analysis, the Office of Advocacy and the OMB must minimize any disagreements and work together. Recognizing that the OMB has the quantitative expertise to monitor agencies effectively, the Chief Counsel should rely on the OMB for special skills.[298]

IV. Relationship of the RFA to the Regulatory Reform Movement

The RFA is part of a broad movement toward regulatory analysis as a method of improving the performance of federal agencies. The RFA is the first such experiment to become law; two omnibus bills which failed to pass in the Ninety-sixth Congress included regulatory analysis as centerpieces.[299] Because a strong impetus for regulatory analysis is in both the House and the Senate of the Ninety-seventh Congress, new legislation likely will be forthcoming and, if it is, the RFA and its regulatory-flexibility requirements will become a key part of the larger pattern of regulatory reform.

A. *The Regulatory Reform Proposals.*

Senator Laxalt has introduced a bill (S. 1,080) to amend the APA by imposing regulatory analysis and review on all agencies that make

297. To some extent this integration has already occurred: the Executive Order ties directly into the RFA requirements. See notes 228-42 *supra* and accompanying text.

298. Of course, the OMB has personnel limitations as well. The Office of Information and Regulatory Affairs has a staff of some 90 professionals, after gaining many of the former employees of the Council on Wage and Price Stability. *See* Eads, *supra* note 60, at 22-23. Because the OIRA has responsibility for the Paperwork Reduction Act and Executive Order 12,291, it is doubtful that it will have the capacity to do much RFA work unless that work relates to its regulatory analysis under the Executive Order.

299. *See* S. 1291, 96th Cong., 1st Sess., 125 Cong. Rec. S7128 (daily ed. June 6, 1979); S. 755, *supra* note 277.

rules.[300] Representative Danielson introduced a related bill (H.R. 746) in the House.[301] Both bills provide for regulatory analysis of new rules, periodic review of existing rules, and publication of a regulatory agenda. In these respects they track similar requirements under the RFA. In other respects, however, they differ from the RFA.[302]

The bills impose standards of regulatory analysis that are more reminiscent of Executive Order 12,291 than of the RFA. For example, both bills deal with "major rules," measured in terms of impact.[303] Furthermore, the type of analysis required is more of the technical cost-benefit type than the general regulatory-flexibility type. The Senate bill requires that the statement of basis and purpose for a major rule include a "reasonable determination" that the benefits of the rule justify the cost and adverse effects of the rule.[304] This amounts to a requirement that cost-benefit analysis determine the outcome of agency rulemaking, except when enabling legislation explicitly dictates to the contrary.[305] The House bill also requires preliminary and final regulatory analyses to be filed with each new rule, although it does not mandate strict compliance with cost-benefit methods.[306] Both bills allow agencies to incorporate regulatory analyses from other statutes.[307]

The bills provide for agency review of existing major rules over a ten-year period (which can be extended to fifteen if necessary).[308] Each

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300. S. 1080, 97th Cong., 1st Sess., 127 CONG. REC. S4231 (daily ed. Apr. 30, 1981). The bill had 74 Senate co-sponsors. S. 1080 was passed by the Senate, with amendments, on March 24, 1982, by a vote of 94 to zero. 128 CONG. REC. S2713 (daily ed. March 24, 1982).

301. H.R. 746, 97th Cong., 1st Sess., 127 CONG. REC. H73 (daily ed. Jan. 6, 1981).

302. The two bills also differ significantly from each other but these differences are not discussed unless they relate to the RFA.

303. *See* S. 1080, *supra* note 300, at § 2(16); H.R. 746, *supra* note 301, at § 621(3). The bills also include under the "major category," rules that have a significant adverse effect on health, safety or the environment and rules that the President designates as major. The House bill adds to regulatory analysis a category of "significant rules" that the agencies are to define according to the number of entities covered, the compliance and reporting requirements involved, the direct and indirect effects of the rule, and the rule's relationship to other rules. H.R. 746, *supra* note 301, at § 621(4).

304. *See* S. 1080, *supra* note 300, at § 3(e)(2).

305. S. 1080 allows for legislation, such as the Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified in various sections of 5, 15, 18, 29, 42, and 49 U.S.C.), which forbids cost-benefit analysis. See text accompanying notes 205-06 *supra*.

306. *See* H.R. 746, *supra* note 301, at § 622. The analysis originally required "an explanation of why an approach entailing greater adverse economic effects was selected," *id.* § 602(c)(5)(B), which did not, unlike the Senate bill, forbid non-cost justified outcomes. In the later revision of the House bill, cost justification of a proposed rule is more clearly demanded. *Id.* § 622(c)(5)(B) (amendment passed July 30, 1981).

307. S. 1080, *supra* note 300, at § 3(f)(4); H.R. 746, *supra* note 301, at § 622(d)(1). These bills do not directly mention the RFA but their drafters probably contemplated the RFA's requirement of regulatory-flexibility analysis.

308. *See* S. 1080, *supra* note 300, at § 560; H.R. 746, *supra* note 301, at § 641.

bill also requires the establishment of regulatory agendas. Whereas the Senate bill requires an agency to publish in the *Federal Register* an agenda for all proposed rules and requires the "President or his designee" to publish a biannual list of major rules,[309] the House bill requires agencies themselves to publish a regulatory agenda of major rules in the *Federal Register* on a biannual basis.[310]

Oversight responsibility for regulatory analysis also appears in the proposed bills. The Senate bill assumes that the justification for a major rule will be reviewed in its statement of basis and purpose as part of the rule. It places in the President "or an officer designated by him" the responsibility for reviewing existing rules and establishing the regulatory agenda.[311] The House bill, which gives oversight responsibility over the final regulatory analysis to the OMB and to the courts,[312] places overall responsibility in the Comptroller General of the United States to audit and to examine agency compliance with the regulatory-analysis process and to make periodic reports to Congress.[313]

B. *The RFA and Regulatory Reform.*

On the solid assumption that some variation of the Senate and House bills will become law, a need to relate that legislation to the RFA and vice versa will arise, for recent congressional activity indicates no effort will be made to eliminate or to reduce drastically the role of the RFA in regulatory review. Because new legislation will largely implement the regulatory-analysis requirements currently imposed by Executive Order 12,291, much of the reconciliation process that now must take place between the Executive Order and the RFA would be relevant to new legislation.[314] To the extent that the Office of Advocacy will already be familiar with the regulatory-flexibility process, the Chief Counsel should be able to protect the working of the RFA in any reconciliation between the RFA and new regulatory-reform legislation.

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309. S. 1080, *supra* note 300, at § 561. The publication of major rules by the President is a function similar to that which President Carter's Regulatory Council performed.

310. H.R. 746, *supra* note 301, at § 631. In addition, the bill instructs the President to publish a Calendar of Federal Regulations, which presents information on major rules from all agencies. *Id.* § 632.

311. S. 1080, *supra* note 300, at § 560(a)(2).

312. H.R. 746, *supra* note 301, at §§ 622(d)(3), 623. Section 624 of the bill provides:

> The Director of the Office of Management and Budget shall monitor and review compliance by agencies with the requirements of this subchapter and shall establish such procedures as may be necessary to ensure such compliance. The Director shall from time to time report to the President and the Congress on such agency compliance.

313. *Id.* § 625.

314. See notes 228-42 *supra* and accompanying text.

There are several ways, however, in which new legislation could reduce the importance of the RFA and the Office of Advocacy. If the House version becomes law and includes "significant" as well as major rules in the regulatory-analysis process, a potentially greater number of rules will be subject both to the RFA and to the cost-benefit type of regulatory analysis. Moreover, because the House bill replaces the regulatory agenda provisions of the RFA with its own regulatory-analysis format, further conflict will exist.[315]

The primary difficulty with the proposed legislation from the Office of Advocacy's viewpoint is the clear shift of monitoring responsibility from the Office of Advocacy to the OMB or other government authorities.[316] This proposed shift suggests that the current overlap in responsibilities between the two organizations will be intensified; given the OMB's stature, further attempts to narrow the Chief Counsel's role in regulatory analysis seem inevitable. The Office of Advocacy, however, remains politically important and any bureaucratic attempt to reduce its authority could create rumblings of support for the Office in Congress.[317]

Thus, the ultimate effect that enactment of generic regulatory-analysis legislation will have on the RFA is difficult to calculate. In some ways the recognition of regulatory analysis throughout government should have a positive effect on the regulatory-flexibility process. Agencies will become better trained to conduct regulatory analyses and more comfortable with concepts such as "tiering" that are of special importance to small entities. The small business community may worry that general reforms will tend to subordinate the special interests of small business to the overall interests of business generally, but whether Congress or the courts will permit this leveling effect to occur remains to be seen.

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315. *See* H.R. 746, *supra* note 301, at § 631, which eliminates section 602 of the RFA, 5 U.S.C. § 602 (Supp. IV 1980) (dealing with the regulatory agenda). The House bill would require the RFA to embrace the general regulatory agenda provisions of the new legislation. This approach certainly will reduce duplication and redundancy, but it will also eliminate special notice to small entities unless the Chief Counsel monitors and reports such agendas to small entities.

316. H.R. 746 gives control to OMB and the Comptroller General, but S. 1080 speaks in terms of the President or his designee. It is not inconceivable that the "designee" could in some situations become the Chief Counsel for Advocacy and thereby ensure a continued role for that Office and for the RFA. *See* 127 CONG. REC. S12,318 (daily ed. Oct. 28, 1981) (remarks of Senator Nunn).

317. Such support has already emerged in the form of an amendment to S. 1080 offered by Senator Nunn which would return control for implementation of the RFA to the Chief Counsel for Advocacy, thereby depriving the President of any option to place RFA oversight in OMB or other executive departments. *See* 127 CONG. REC. S12,318-19 (daily ed. Oct. 28, 1981).

VI. Conclusion

The RFA is a significant legislative achievement for small business. Given the current state of generic regulatory reform, the ultimate impact of the RFA is difficult to predict. Several factors, however, are currently observable that will aid in determining the RFA's importance. One factor is the effectiveness of the entity that must implement the RFA, the Office of Advocacy. The Office, if it carefully manages its power to react decisively to questionable certifications and weak analyses, can gain the attention of the agencies that must respond initially to the RFA's requirements.

Careful management requires not only a consolidation of efforts concerning the certifications and the IRFA's, but also an ability to work effectively with the OMB. Despite its preoccupation with other regulatory-reform legislation, the OMB can provide the expertise necessary to assist the Office of Advocacy in becoming an effective oversight agency.

More importantly, the provisions of the RFA concerning judicial review deserve the Chief Counsel's attention. Although the RFA clearly does not contemplate an assertive judicial role in enforcing agency compliance with regulatory-flexibility analysis, there are ways in which the Chief Counsel can effectively intervene to alert the courts to the RFA and thereby increase agency incentives for compliance. Finally, the Chief Counsel's reports to Congress and to the President can alert those branches of government to the importance of implementing the RFA.

Small business expects much from the RFA, perhaps too much. The RFA does make agencies aware of the plight of small business, and this awareness can influence rulemaking proceedings just as it influenced congressional action. The RFA is special-interest legislation with a balance: it urges agencies to recognize differences in size when promulgating rules, but it does not undermine the agency's regulatory authority derived from organic legislation. Thus, while the RFA may not be all the small business community desires, it contains the seeds for producing workable compromises between government and the private sector and it does not pose unreasonable burdens on the administrative process.

Appendix

THE INTERACTION OF THE REGULATORY FLEXIBILITY ACT, THE PAPERWORK REDUCTION ACT AND EXECUTIVE ORDER NO. 12,291

	Regulatory Flexibility Act (RFA) 5 U.S.C. §§ 601-612 (Supp. IV 1980)	Paperwork Reduction Act (PRA) 44 U.S.C. §§ 3501-3520 (West Supp. 1980)	Executive Order No. 12,291 (EO) 46 Fed. Reg. 13,193
GENERAL	It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and information requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to ensure that such proposals are given serious consideration.	1. "[E]fficient, effective, and economical" collection of information and compliance with "policies, principles, standards, and guidelines" of OMB (§ 3506(a)). 2. Designation of a "senior official" responsible for PRA by 6/30/81 (§ 3506(b)). 3. Compliance with requirements of the Federal Information Locator System (3506(d)). 4. Cooperation with other agencies (§ 3510). 5. Cooperation with OMB (nonindependent regulatory agencies) (§ 3515).	1. Decisions must be based on "adequate information" (Sec. 2(a)). 2. Benefits of regulatory action to society must outweigh cost to society (Sec. 2(b)). 3. Net benefits to society must be maximized (Sec. 2(c), (e)). 4. Alternative with least net cost to society must be chosen (Sec. 2(d)). 5. Overlaps and duplications must be minimized (Sec. 6(a)(5)).

	Regulatory Flexibility Act (RFA) 5 U.S.C. §§ 601-612 (Supp. IV 1980)	Paperwork Reduction Act (PRA) 44 U.S.C. §§ 3501-3520 (West Supp. 1980)	Executive Order No. 12,291 (EO) 46 Fed. Reg. 13,193
AGENDA	1. Prepare, in October and April of each year, an agenda, including a brief description and summary of the nature of rule (§ 602(a)). 2. Transmit it to the Chief Counsel for Advocacy of the SBA (§ 602(b)). 3. Provide notice in publications "likely to be obtained" by small entities (§ 602(c)).	1. Systematically inventory and periodically review information systems and activities (§ 3506(c)). 2. Eliminate overlaps and duplications in information gathering. 3. "[A]ssess paperwork and reporting burden of proposed legislation" affecting agency. 4. Account for acquisitions under FPASA § 111 (40 U.S.C. § 759).	1. Prepare, in October and April of each year, a Regulatory Agenda, including summary of nature and legal basis for existing rules listed (Sec. 5). 2. Publish it in form required by OMB (Sec. 5(a) & (b)(2)). 3. On request of OMB, provide additional information (Sec. 5(b)(1)).
PROPOSED RULES	1. Publish, with notice of proposed rulemaking, an Initial Regulatory Flexibility Analysis (IRFA), including reasons for action, objectives and legal basis of rule, small entities affected, reporting requirements, duplication of federal rules, and applicable alternatives (§ 603). 2. Transmit it to the Chief Counsel for Advocacy of the SBA (§ 603).	1. No later than publication of notice of proposed rulemaking, make copy of rules that contain a "collection of information" requirement (§ 3504(h)). 2. Transmit it to the Director of OMB (§ 3504(h)). 3. On request of OMB, provide additional information (§ 3504(h)).	1. Sixty days prior to publication of notice of a proposed "major rule," prepare a Preliminary Regulatory Impact Analysis (PRIA), including cost-benefit analysis, alternatives, and legal basis of rule (Sec. 3(d)). 2. Transmit it to OMB with a copy of the proposed rule (Sec. 3(e)). 3. Publish determination whether a rule is major and if major a summary of the PRIA with the notice of proposed rulemaking (Sec. 3(g)(1)). 4. Transmit copy of non-major rule to OMB 10 days prior to publication (Sec. 3(c)(3)).

	Regulatory Flexibility Act (RFA) 5 U.S.C. §§ 601-612 (Supp. IV 1980)	Paperwork Reduction Act (PRA) 44 U.S.C. §§ 3501-3520 (West Supp. 1980)	Executive Order No. 12,291 (EO) 46 Fed. Reg. 13,193
NOTICE AND COMMENT	Small entities must be given an opportunity to participate in rules having a "significant economic impact on a substantial number of small entities" (§ 609).		RIAs must be made "available to the public" (Sec. 3(h)).
FINAL RULES	1. Publish, with publication of final rules, the Final Regulatory Flexibility Analysis (FRFA), including need for and objectives of rule, summary of public comments, and alternatives (§ 604(a)). 2. Copies of the FRFA must be made available to the public (§ 604(b)).	When final rule is published, explain how any collection-of-information requirement contained in the final rule responds to the comments made by OMB or by the public (§ 3504(h)(3)).	1. Thirty days prior to publication of "major rules" as final* prepare a Final Regulatory Impact Analysis (FRIA) including the same information as the PRIA (Sec. 3(d)). 2. Transmit it to OMB with a copy of the final rule (Sec. 3(c)). 3. Publish, along with the final rule, a memorandum of law and a determination that the rule is supported by the agency record (Sec. 3(g)(2)). 4. Transmit copy of non-major rule to OMB ten days prior to publication (Sec. 3(c)(3).
IMPLEMENTATION		1. "[C]onduct or sponsor" the collection of information only after seeking Federal sources, reducing burden on reporters, planning for potential users, complying with § 3504(h), writing explanation to OMB, preparing notice for publication, and obtaining OMB's approval (§ 3507(a)).	

	Regulatory Flexibility Act (RFA) 5 U.S.C. §§ 601-612 (Supp. IV 1980)	Paperwork Reduction Act (PRA) 44 U.S.C. §§ 3501-3520 (West Supp. 1980)	Executive Order No. 12,291 (EO) 46 Fed. Reg. 13,193
		2. Display OMB's "control number" on collections of information (§ 3512). 3. Inform reporter when a request for information is not subject to § 3507 (§ 3506(c)(5)).	
SUNSET REVIEW	1. Publish, by June 30, 1981, a "plan for the periodic review" of rules affecting small entities, which shall provide for review of existing rules within ten years (§ 610). 2. Publish in *Federal Register*, annually, a list of rules to be reviewed during that year, including rules promulgated after Jan. 1, 1981 (§ 610).	1. Prepare, on request of OMB, a written statement responding to OMB's evaluation of agency's information-management activities (§ 3513). 2. Submit it to Congress (§ 3513).	Review currently effective rules, and perform RIAs for major rules (Sec. 3(i)).
SPECIAL OPTIONS	1. Agendas, IRFAs, and FRFAs can be done in conjunction with agendas or analyses required by other laws (§ 605(a)). 2. Waive IRFAs and FRFAs by certifying that rule "will not, if promulgated, have a significant economic impact on a substantial number of small entities" (§ 605(b)). 3. Treat a "series of closely related rules" as one rule (§ 605(c)). 4. Waive IRFAs and delay FRFAs for 180 days in emergencies (§ 608).	1. Independent regulatory agencies may void OMB determinations under § 3504(h), if the agency "by a majority vote of its members" votes to override them (3507(c)). 2. Written statements supporting the necessity for a collection of information may be submitted to OMB (§ 3508).	1. Make determination whether a rule is "major," subject to overrule by OMB (Sec. 3(b)). 2. Combine RIAs with IRFAs and FRFAs (Sec. 3(a)). 3. Incorporate Regulatory Agendas with RFA agendas (Sec. 4(a)). 4. In emergencies, publish in *Federal Register* a statement why compliance with the EO is impracticable;

Regulatory Flexibility Act (RFA) 5 U.S.C. §§ 601-612 (Supp. IV 1980)	Paperwork Reduction Act (PRA) 44 U.S.C. §§ 3501-3520 (West Supp. 1980)	Executive Order No. 12,291 (EO) 46 Fed. Reg. 13,193
		transmit RIA on major rules as soon as possible (Sec. 8(a)(1)).
		5. Publish in *Federal Register* reasons for impracticability where EO conflicts with statutory authority or judicial order; comply with EO when possible (Sec. 8(a)(2)).
		* For major rules for which no notice of proposed rulemaking is to be published, transmit copy and FRIA to OMB sixty days prior to the rule's publication as a final rule.

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Senator HATCH. Mr. Bangert, we are happy to turn to you and we are happy to welcome you before this committee.

STATEMENT OF CHARLES BANGERT

Mr. BANGERT. Thank you, Senator Hatch.

We appreciate the opportunity to appear before your joint committee's oversight hearing and commend you on the hearings.

As you indicated, accompanying me is my partner, Charles A. Price, who is the litigation lawyer in our firm.

In the interest of time, and since Dean Verkuil put the issues in perspective, we will summarize, and leave out the first five pages of our statement and start on page 6, so that we can get right into the fight with Dean Verkuil.

In our opinion, the most important aspect of the Regulatory Flexibility Act is——

Senator HATCH. When he worked around here, Dean, he was always that tough in every way.

Mr. VERKUIL. I am glad to know that.

Senator HATCH. Excuse me. Go ahead.

Mr. BANGERT. The most important aspect that the subcommittee should address is the question of judicial review. We think it is obvious that unless agency compliance with the Reg-Flex act can be policed by judicial review, the Act, for all practical purposes and intents, will be rendered meaningless.

The present confusion over judicial review is directly related to the statutory language itself. The first part of section 611(b) on the one hand, indicates that there is no judicial review. On the other hand, a reading of the remainder of subsection (b) equally clearly indicates that some sort of judicial review is, in fact, contemplated.

Now, it is our contention that the courts should give effect to all of the language of the statute, rather than just the first sentence of subsection (b), and that, while Congress intended to prohibit interlocutory or other review of rulemaking proceedings solely under the provisions of the Regulatory Flexibility Act as such, Congress equally intended to permit judicial review of the agency's compliance or noncompliance with the act as a part of "the whole record of agency action" in review proceedings instituted under the applicable provisions and standards of the Administrative Procedures Act.

Now, compounding the confusion caused by the statutory language of the act, the legislative history of the act seems both to support and deny judicial review in the same report and sometimes even in the same page of the report. On pages 7, 8, and 9, we have quoted the language of the Senate "Discussion of Major Issues" where, in our view, it is clearly contradictory. So both sides in a lawsuit can get comfort out of the legislative history as far as judicial review is concerned.

If you take a look at the legislative history on judicial review, perhaps it suggests a third interpretation of the scope of judicial review, and that is that although regulatory flexibility analyses themselves are judicially reviewable, certifications of no significant impact, exempting an agency from making the analysis in the first place, are not. Such a result, while it may make sense out of the

legislative history, hardly makes any sense in reality. The net effect—small business would be left at the mercy of the agencies, who would have uncontrolled power to determine whether they could comply with RFA or not, since there would be no judicial review of an exempting certification regardless of whether it was promulgated in good or bad faith.

We recognize that section 612 of the act provides for the monitoring of agency compliance by the chief counsel for advocacy and for annual reports to the President and the oversight committees of Congress. And Dean Verkuil has suggested in his statement that perhaps this is sufficient to assure compliance. We also recognize that both the President and Congress can act in jawboning agencies into compliance. But we think it seriously doubtful that such an indirect and long after-the-fact method of enforcement will ever prove to be of any meaningful assistance to small businessmen, directly and immediately adversely affected by agency rules. In fact, such enforcement adds precious little to the small businessman's existing right to petition the Government for relief. And finally, it would not appear to be sound public policy to place Congress or the President in the position of constantly intervening in the conduct of agency rulemaking procedures, and I think Congress would be very reluctant to put itself in that position.

Now, the Office of Advocacy also can jawbone in an attempt to achieve compliance with the act, and we think they have been doing that. However, this approach also seems unsatisfactory. The Office of Advocacy does not really have much in the way of leverage over other agencies. For example, it is our understanding that the agency that we are involved in litigation with has been advised by the Office of Advocacy that they are deficient in another 73 additional rulemaking proceedings that they have undertaken.

And, as Dean Verkuil points out in his generally excellent study of the Regulatory Flexibility Act—and of course, it is generally excellent except when he disagrees with us—during the first 6 months of the act's existence, the Office of Advocacy received some 1,000 rules, including 20 initial regulatory flexibility analysis, and about 800 certifications of no substantial effects. The Office of Advocacy at that time had 25 attorneys and 6 to 8 economists available to perform its rule-monitoring function, according to Dean Verkuil's study.

The other area that we think the Joint Subcommittees should be interested in is the amicus curiae role that the Office of Advocacy can play. First of all, although that language is in the statute, it is unclear how such a rule would ever become a reality if the Regulatory Flexibility Act is held not to be subject to judicial review.

Moreover, the Department of Justice has taken the position that despite the clear language of the statute authorizing the Chief Counsel for Advocacy to appear as an amicus, only the Attorney General of the United States can be the legal representative of the Government in legal proceedings involving the RFA. So you can imagine the Attorney General's Office on the one hand arguing from the defendant's side of the courtroom, the Government's or defendant's case, and then changing its hat and coming over to the plaintiff's side of the courtroom and arguing as an amicus on behalf of the plaintiff, and that does not seem to make much sense.

One other thing that I think is significant. The very nature of the Office of Advocacy suggests that perhaps it will not have the independence as it is now structured to enable it to freely make its determination as to how and when to appear as an amicus. The Chief Counsel is an Executive appointee, subject to service at the pleasure of the President. Regardless of who the Chief Counsel is, or who controls the executive branch of the Government, it would seem prudent for the future to grant a more independent status to the Chief Counsel for Advocacy, such as a good behavior appointment to coincide with the Presidential term.

In conclusion, regardless of the outcome of the various lawsuits now in process involving the Regulatory Flexibility Act, we believe that Congress will ultimately be forced to face certain basic issues with regard to the act. These issues in our view will include the scope of judicial review of the act, including whether or not certifications of no effect are reviewable; the role of the Office of Advocacy and its ability and authority to assure agency compliance with the act; and whether the Chief Counsel for Advocacy has an unfettered right to appear as an amicus in review proceedings.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Bangert follows:]

Prepared Statement of Charles E. Bangert

Messrs. Chairman, Members of the Subcommittees.

My name is Charles E. Bangert of the law firm of Randall, Bangert & Price, here in Washington, D. C. Accompanying me is my partner, Charles A. Price.

We appreciate the opportunity to testify before your respective subcommittees on the subject of the Regulatory Flexibility Act (P.L. 96-354) and commend you for your most worthy efforts to assure that this statute which is so important to the thousands of small businesses in this country in fact is working on their behalf. We also commend Senator Dodd for his introduction and support of S2170 which would amend the Regulatory Flexibility Act to assure the application of the Act's requirements to all Federal agencies publishing a general notice of proposed rulemaking for any proposed rule. There seems to be no compelling reason why the Department of Defense or the Internal Revenue Service, both of whom have a very significant impact on small business, should not be required to consider that impact during their rulemaking proceedings.

We have been requested to comment on the current effectiveness of the Regulatory Flexibility Act, our views on agency implementation of that Act, and whether the Act is meeting its objectives. Before doing so it might be helpful to the Members of the Subcommittees to be advised of the manner in which we first became acquainted with the Regulatory Flexibility Act.

Earlier this year, we were requested by a client to look into the increases in the application fees and annual rents promulgated by the Department of the Interior for Federal lands noncompetitive oil and gas leases. In examining the public record concerning these increases we found that the Department had purported to exempt its rulemaking from the requirements of the Regulatory Flexibility Act simply by publishing the statement that its fee and rent increases would not have a significant

economic impact on a substantial number of small entities. Significantly, and in direct violation of the express requirements of Section 605 of the RFA and its own internal rules, the Department made no attempt to publish the reasons justifying its "no significant economic impact" certification.

On this state of facts, our client, a small independent oil and gas explorer, brought suit against the Department of Interior under the Administrative Procedure Act to enjoin the enforcement of the Department's fee and rent increases until the Department complied with the requirements of the RFA.

In response, the Department of Justice argued on behalf of Interior that agency compliance or noncompliance with the RFA was not subject to judicial review, and moved to dismiss our client's complaint. The District Court for the District of Columbia agreed with the government's argument, finding that it had no power to review the Department of Interior's compliance with the RFA, and dismissed our client's complaint. The case is presently pending on appeal before the United States Court of Appeals for the District of Columbia.

With respect to this hearing, it is particularly important to note that it was only after our lawsuit had been filed that the Department of Interior publicly disclosed that it had in fact conducted, at the beginning of its rulemaking proceeding, a formal "Determination of Effects of Rules" analysis concerning its proposed fee and rent increases and had found that:

1. The proposed application fee increase would eliminate fifty percent (50%) of the participants in the federal noncompetitive oil and gas leasing program;

2. The proposed subsequent rent increase would eliminate fifty percent (50%) of the future leaseholders from the program; and

3. Although the Department knew that a substantial number of small entities such as small oil companies and investment businesses participated in the noncompetitive leasing program, it

had no data on the actual number or percentage of small businessmen involved.

Simply put, the Department of Interior apparently did not wish to take the time necessary to comply with the requirements of the RFA, or the requirements necessary to exempt itself from making the otherwise required analysis. Consequently, the Department feigned compliance by publishing the unsupported assertion that its action would not adversely affect small businesses, and deliberately failed to place on the public record its own analysis that contradicted that conclusion.

Significantly, the Chief Counsel for Advocacy has just recently advised the Department of Interior by letter dated July 8, 1982, that the Rule which we contested should have been subject to an Initial Regulatory Flexibility Analysis, and that the certification of "no impact" was substantially incorrect.

Throughout the past several years Congress has evidenced a continuing concern over excessive government interference in the marketplace, and, in particular, concern over the ever increasing burdens imposed by government regulations on small business.

For years the small business community has also expressed its growing concern that many of the rules and regulations enacted by the federal agencies weigh disproportionately upon them due to the inherent nature of small business, bereft of the attorneys, accountants, tax experts and the other experts necessary to help them cope efficiently with the growing maze of federal regulations. Additionally, there has been a growing feeling among small business that the continued viability of their businesses was being determined by faceless bureaucrats in Washington having neither knowledge of, nor concern for the views and needs of the small businessman. Congress' growing concern with these problems resulted, in part, in the enactment of the Regulatory Flexibility Act in 1980.

Succinctly stated, the purpose of the Act is to require federal agencies to affirmatively examine whether, and to what

extent, their proposed regulations will adversely affect small business, and in those instances where there is an anticipated significant adverse economic impact on a substantial number of small businesses, to consider alternative courses of action that might minimize those adverse effects. In addition, the Act sought to assure that the small business concerns that might be affected by a proposed regulation would have adequate notice of, and a fair opportunity to make comment in the course of the process by which rules were promulgated. The RFA does not require any federal agency to take or refrain from taking any substantive act. All the RFA requires is that the agencies in good faith consider the effects of their new rules and regulations on small entities and publish their analyses in the Federal Register to facilitate reasonable oversight by the public and by the Congress.

It is also significant to note that one of the express reasons for passage of the RFA was the fact that preceding Executive Orders mandating similar consideration of the effects of agency rulemaking on small business had been honored by the agencies more in the breach than in the observance.

Obviously, we are not in a position to accurately discern on a government-wide basis whether or not the Regulatory Flexibility Act is being followed by the various government agencies. The Small Business Administration is in a much better position to make such a general assessment. Within our limited sphere of knowledge, we do understand that in addition to our lawsuit there is currently pending before the U. S. District Court in Massachusetts one other matter involving the Regulatory Flexibility Act, and that at least one other action will probably be filed shortly, here in the District of Columbia. In addition, we understand that since adopting the rule challenged in our lawsuit, the Department of the Interior has proposed and/or adopted some 73 additional rules, each of which barely pays lip service to the requirements of the RFA following the pattern established by the noncompetitive oil and gas lease application fee and rent increase rule.

In our opinion, the most important aspect of the RFA that your subcommittees should address is the question of judicial review. We think it is obvious that unless agency compliance with the RFA can be policed by judicial review, the Act, for all practical intents and purposes, will be rendered meaningless.

The present confusion over judicial review is directly related to the statutory language itself:

> "§611. Judicial Review
>
> "(a) Except as otherwise provided in subsection (b), any determination by an agency concerning the applicability of any of the provisions of this chapter to any action of the agency shall not be subject to judicial review.
>
> "(b) Any regulatory flexibility analysis prepared under sections 603 and 604 of this title and the compliance or noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review. When an action for judicial review of a rule is instituted, any regulatory flexibility analysis for such rule shall constitute part of the whole record for agency action in connection with the review.
>
> "(c) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise provided by law."

At first glance, Section 611 appears to present a logical dilemma. On the one hand, the first sentence of subsection (b) clearly states that compliance or noncompliance by an agency with the provisions of the Act is not subject to judicial review. It is this sentence that the government is relying on as the support for its position that agency RFA compliance is not subject to judicial review, and that the District Court for the District of Columbia relied on in dismissing our case.

On the other hand, a reading of the remainder of subsection (b) equally clearly indicates that some form of judicial review is contemplated. It is our contention that the courts should give effect to all of the language of the statute, rather than just the first sentence of subsection (b); and that, while Congress intended to prohibit interlocutory or other review of rulemaking proceedings <u>solely</u> under the provisions of the Regulatory Flexibility Act as such, Congress equally intended to permit

judicial review of an agency's compliance or noncompliance with the Act as a part of "the whole record of agency action" in review proceedings instituted under the applicable provisions and standards of the Administrative Procedure Act.

Compounding the confusion caused by the statutory language, the Act's legislative history both supports and denies judicial review, often in the same report, and sometimes even on the same page. Thus, the "Discussion of Major Issues and Section by Section Analysis" provides:

> "As this discussion demonstrates, the bill strikes a balance between two central aims with regard to the role of the courts. The first is to insure that an agency's compliance with the objectives of this bill be subject to meaningful, yet responsibly defined, judicial oversight. A flat prohibition of any such oversight might give the erroneous impression that regulatory flexibility provisions may be ignored with impunity. The bill clearly provides that the contents of the regulatory flexibility analysis shall become part of the administrative record that is before a court to determine the validity of a challenged rule. The uneven record of agency implementation of Executive Order 12.044 (43 Fed. Reg. 12.66) (1978) and the Presidential Memorandum on regulatory flexibility (Nov. 16, 1979, see Regulatory Reform Hearings, Part 3, at 247-248), both of which are completely immune judicial review, supports this concern.
>
> "On the other hand, the bill avoids the substantial disruption of agency rulemaking inherent in allowing separate judicial review of the regulatory flexibility analysis itself in the manner of an environmental impact statement . . . Under the bill it is still the legality of the rule, not of the regulatory flexibility analysis itself, which is the subject of the 'arbitrary and capricious' test.
>
> "This careful balance avoids overturning three decades of case law under the Administrative Procedure Act and still delineates an appropriate scope of judicial oversight.
>
> "For example, in the unlikely event that following an agency head's decision not to certify that a particular rule will have no significant economic impact on a substantial number of small entities (pursuant to Section 605(b), the agency then completely ignores the resulting requirements to perform regulatory flexibility analyses, an injured party would have grounds to argue that this fact is evidence of the unreasonableness of the rule. Similarly, if it can be demonstrated that a regulatory flexibility analysis has not been prepared in good faith and the agency therefore is unable to provide substantive grounds supporting the final rule in the statement of basis and purpose, the court would have grounds to invalidate the rule.

> In addition, if an agency completely fails to respond to a clearly available significant alternative to the rule less burdensome on small entities and raised in public comments, then this failure would be grounds for finding the rule unreasonable under established case law." 126 Cong. Rec. S. 10939 (Aug. 6, 1980) [emphasis supplied].

Three pages later, the same Report states:

> "Section 611(a) provides that there is no judicial review of any determination by an agency regarding the applicability of any provision of this subchapter except as provided in Section 611(b). This means for example that the decision by an agency with respect to what proposed rules would have a significant economic impact on a substantial number of small entities pursuant to Section 608(b) shall not be subject to judicial review. Thus, the decision regarding when the agency shall conduct a regulatory flexibility analysis remains in the sole discretion of the agency. Also not subject to judicial review are agency determinations regarding the agenda (section 602), the procedures for gathering comments (section 609), the periodic review of rules (section 610), and any other administrative determinations under this act." 126 Cong. Rec. S. at 10942-43 [emphasis supplied].

This history suggests a third interpretation of the scope of judicial review to the effect that, although regulatory flexibility analyses are judicially reviewable, certifications of "no significant impact" exempting an agency from making the analyses in the first place are not. Such a result, while it may make sense out of the legislative history, hardly makes any sense in reality. In net effect, small business is left at the mercy of the agencies who would have uncontrolled power to determine whether they would comply with RFA or not, since there would be no judicial review of an exempting certification regardless of whether it was promulgated in good faith or bad faith.

If the Department of Justice's view is correct, the Regulatory Flexibility Act will be rendered totally dependent upon the goodwill of the agencies in following its requirements. A result hardly compatible with Congress' attempt to put teeth into the pre-existing Executive Order flexibility programs.

We recognize that Section 612 of the Act provides for the monitoring of agency compliance by the Chief Counsel for Advocacy of the Small Business Administration and for annual reports to the President and the oversight committees of Congress.

We further recognize that both the President and the Congress can attempt to jawbone the agencies into compliance. Nevertheless, we think it seriously doubtful that such an indirect, long after-the-fact mode of "enforcement" will ever prove to be of any meaningful assistance to those small businesses directly and immediately adversely affected by agency rules. In fact, such "enforcement" adds precious little to the small businessman's existing right to petition the government for relief. Finally, it would not appear to be sound public policy to place Congress or the President in the position of constantly intervening in the conduct of agency rulemaking procedures.

In addition, of course, the Office of Advocacy could jawbone in an attempt to achieve compliance with the Act, and it seems that that Office is attempting to do exactly that at the present time. This approach, however, is also unsatisfactory from several viewpoints. To begin with, the Office of Advocacy has little, if any, leverage with the other agencies. For example, as previously noted, it is our understanding that the Department of the Interior alone has failed to comply with the Regulatory Flexibility Act in at least 73 additional rulemaking proceedings since the one challenged in our lawsuit. Moreover, it is questionable whether "backroom" conferences between the Office of Advocacy and the agencies would fulfill the statutory intent of Congress that agency determinations affecting small business be open to public scrutiny.

Finally, as Dean Verkuil of Tulane Law School points out in his generally excellent study of the Regulatory Flexibility Act, during the first six months of the Act's existence (January 1, 1981 to July 31, 1981) the Office of Advocacy received some 1000 rules, including 20 IRFA's and about 800 certifications of no substantial effects. The Office of Advocacy at the time of the study had 25 attorneys and 6 to 8 economists available to perform its rule monitoring functions.

Section 612 also specifically provides a right for the Office of Advocacy to appear as amicus curiae in any action brought

in a court of the United States to review a rule, although it is unclear how such a role would ever become reality if the Regulatory Flexibility Act is held not subject to judicial review. Moreover, the Department of Justice has taken the position that, despite the clear language of the statute authorizing the Chief Counsel for Advocacy to appear as an amicus, only the Attorney General of the United States can be the legal representative of the government in legal proceedings involving the RFA. In net effect, the Department of Justice, not content with its normal role as defense counsel for agencies accused of failing to comply with the RFA, is also seeking to absolutely control and/or eliminate any appearance in the courtroom by the expert appointed by Congress to supervise RFA compliance. It is our understanding that the Office of Advocacy and the Department of Justice are presently negotiating the circumstances and manner of any possible future amicus appearance by the Chief Counsel for Advocacy. The very nature of the Office of Advocacy suggests, however, that it will never have the independence necessary to enable it to freely make its own determination as to how and when it should appear in court proceedings, since the Chief Counsel is an Executive appointee subject to service at the pleasure of the President. Regardless of who the Chief Counsel is, or who controls the Executive Branch of the government, it would seem prudent for the future to grant a more independent status to the Chief Counsel, such as a good behavior appointment to coincide with the presidential term.

In conclusion, regardless of the outcome of the various lawsuits now in process involving the Regulatory Flexibility Act, we believe that Congress will ultimately be forced to face certain basic issues with regard to the RFA. These issues in our view will include the scope of judicial review of the Act, including whether certifications of no effect are reviewable; the role of the Office of Advocacy and its ability and authority to assure agency compliance with the Act; and whether the Chief Counsel for Advocacy has an unfettered right to appear as an amicus in review proceedings.

Senator HATCH. Thank you very much, Mr. Bangert.

Let me ask you this. Do you believe that certifications are reviewable under the present act?

Mr. BANGERT. We are arguing that they are reviewable, so obviously we do believe that they are reviewable. However, we do think that the language of the statute could be subject to a different interpretation.

Senator HATCH. You mentioned that it is not sound public policy to place the Congress or the President in the position of constantly intervening in agency rulemaking procedures. Now, what do you mean by that statement?

Mr. BANGERT. Well, by that, I mean this. You will have an individual case, and what will happen is that you are going to be creating more and more pressures on Congress. You are going to have small businessmen, large businessmen, small entities, everybody, running up to Congress and saying, "Please get into this particular case." Now, I think what that does is perhaps upset the judicial tone of that case when you have that kind of intervention, and I think that it is going to be terribly bothersome for Congress to have put themselves in the position of being open to pressure to intervene in individual cases.

Senator HATCH. Are you of the opinion that the Office of Advocacy is understaffed?

Mr. BANGERT. Yes, I guess I am of that opinion.

Senator HATCH. If several regulatory flexibility suits are pending concurrently in the courts, how would you suggest that the Chief Counsel allocate his resources concerning amicus appearances?

Mr. BANGERT. Well, obviously, I would think that the Chief Counsel would have to pick and choose which cases he would want to file an amicus on, and I think there are several basic underlying determinations that he could make. In a letter, as a matter of fact, that Frank Swain wrote to Chairman Weicker, regarding that question, he laid out the number of considerations that he had to review before making a determination as to whether to intervene. I would think one of those determinations would be whether or not the basic act itself was endangered by a particular Government position.

So I think that there are standards, and I would generally agree with those standards laid out in Mr. Swain's letter to Chairman Weicker.

Senator HATCH. Well, thank you, Mr. Bangert.

Dean Verkuil, in your opinion, does the Chief Counsel have the statutory authority to appear in district court and argue both the law and the facts of a case?

Mr. VERKUIL. Well, I had not thought of the Chief Counsel going to district court at all, really, no. I think the way the act sets up, Senator, is on review of the rule in most cases in the Court of Appeals.

Senator HATCH. You are saying, then, that he does not have the statutory authority to go to district court?

Mr. VERKUIL. No, I would not go that far. I would say that if the rule itself is to be reviewed in the district court, then he has the statutory authority to follow the rule wherever it is to be reviewed.

Senator HATCH. He may have a statutory obligation to go under those circumstances, right?

Mr. VERKUIL. I do not imagine he would have an obligation to follow every rule because of problems of time and prioritizing, but I would think that he has to follow—wherever the rule ends up for review, he has the right and, in effect, the obligation, to be there if he thinks there is something wrong with the underlying regulatory analysis.

But whether he can create facts or not is a tougher one, still. I would say generally no, even in the district court, unless the court itself in its reviewing role contemplates factfinding on review of a rule. And in most, almost all cases, that would not be true.

Senator HATCH. Well, thank you. We appreciate the testimony of both of you and the testimony of all witnesses today. This has been a most interesting hearing.

We will recess the hearing at this point and keep the record open until the end of the day for any questions that any member of either committee cares to submit to any witness who has testified here today.

Thank you so much, and thank you for your effort.

With that, we will recess.

[Whereupon, at 11:45 a.m., the joint subcommittees adjourned.]

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